

THE ALL INDIA REPORTER

1918

G. N. Das
Advocate High Court
Jaipur & Kasauli
Sdnagar.

ALLAHABAD SECTION

CONTAINING

FULL REPORTS OF ALL REPORTABLE JUDGMENTS OF
THE ALLAHABAD HIGH COURT
REPORTED IN

- (1) I. L. R. 40 ALLAHABAD (2) 16 ALLAHABAD LAW JOURNAL
(3) 19 CRIMINAL LAW JOURNAL (4) 43 TO 48 INDIAN CASES

CITATION—A. I. R. 1918 ALLAHABAD

PRINTED BY D. G. RANADE AT THE ALL INDIA REPORTER PRESS, NAGPUR.

AND PUBLISHED BY

V. V. CHITALEY, B.A., LL.B.

AT THE ALL INDIA REPORTER OFFICE,

NAGPUR, C. P.

(All Rights Reserved.)

TO
THE LEGAL PROFESSION
IN GRATEFUL RECOGNITION OF
THEIR WARM APPRECIATION AND SUPPORT

COMMUNITY LIB.	
K. CIVIL	
Acc No	76000
Date	11. 2. 7

5/102

V. V. CHITALEY, B.A., LL.B.

C. R. NAGPUR, C. R.

(The Author's Address)

ALLAHABAD HIGH COURT

1918

**Books
Checked**

Chief Justice :

The Hon'ble Sir Henry George, Richards, Kt., K. C.

Puisne Judges :

The Hon'ble Sir. George Edward Knox, Kt., I. C. S.

" " Pramada Charan Banerji, Kt.,

" Mr. William Tudball, I. C. S.

" " Muhammad Rafiq.

" " Theodore Caro Piggott, I. C. S.

" " Cecil Henry Walsh, K. C.

" " Saiyid Abdul Raoof.

" " Alfred Edward Ryves.

" " Benjamin Lindsay, I. C. S.

J. N. Das

— Advocate High Court

Jammu & Kashmir

Srinagar.

NOMINAL INDEX

Abdul Aziz v. Abdul Jalil	375	Deoki Nandan v. Gapua	344
Abdul Latif Khan v. Emperor	111(2)	Deo Narain Singh v. Sitla Baksh Singh	84
Abdul Rashid v. Emperor	109(2)	Deo Sarau Tewari v. Emperor	320(1)
Abdul Rashid Ali-Khan v. Budh Sen	367	Devi Prasad v. J. A. H. Lewis	248
Abhilakh Dhelphora v. Liladhar Dhal-phora	352	Dhara Singh v. Gayan Chand	186(1)
Abinash Chandra v. Shekhar Chandra	232	Dooba Tewari v. Emperor	216(1)
Afzal Shah v. Lachmi Narain	425	Drig Pal Singh v. Kunjal	222
Ahmed Khan v. Mt. Gaura	285	Dulli v. Emperor	65
Ajnasi Kuar v. Prayag Singh	264	Durga Prasad v. Shambhu	380
Alamdar Husain v. Motiram	337	Emperor v. Babu Prasad	415(2)
Ali Raza v. Sanwal Das	21(1)	* ——— v. Bahawal Singh	111(1)
Amir Hasan Khan v. Emperor	266	———— v. Bhagwani	228(2)
Amtul Habib, Mt. v. Mahomed Yusuf	234	———— v. Ghulam Husain	107
Anandgir v. Sri Niwas	349	———— v. Goda Ram	296(1)
Anandi Kunwar v. Ram Niranjana Das	324(2)	———— v. Gulab	420
Anchal v. Dalip Singh	428	———— v. Harak Chand Marwar	174
Angad Singh v. Zorawar Singh	270	———— v. Khushali Ram	129
Ant Ram v. Mithan Lal	167	———— v. Khushi Ram	361
Ashbey Clarke Harris v. Emperor	353	———— v. Raghunath	351
Azizur Rahaman v. Hansa	417	Faiyaz Ali Khan v. Behari	SB 128
Babu Ram v. Emperor	85(2)	Farzand Ali v. Rahat Ali	194(1)
Babu Ram v. Emperor	113	Fazal Rab v. Manzur Ahmad	192
*Badri Prasad v. Emperor	326	Gajadhar v. Emperor	67 (1)
Bakhtawar v. Emperor	211(1)	Ganga, Mt. v. Kanhai Lal	15
Baldeva v. Panna Lal	79(1)	Ganga Ram v. Emperor	382(2)
Balgobind Rai v. Sheoraj Rai	341	Ganeshi Lal v. Babu Lal	223
Balwant Singh v. Joti Prasad	115	Ganges Flour Mills Ltd. v. Shadi Ram	384(1)
Banarsi Das v. Sheodarshan Das Shastri	309	Gauri Sahai v. A. O. Bahree	183(1)
Barkat Ali v. Emperor	338	Gauri Shankar v. Emperor	283
Basanti v. Kunj Behari Lal	78	Ghasi v. Emperor	378
Behari Lal v. Baldeo Narain	422	Ghulam Mohiuddin Khan v. Damber Singh	330
Bhagwan v. Emperor	130	Girdhar Das v. Sideshwari Prasad	296(2)
Bhagwandas Gondka v. Ram Kumar Ram-mesher Das	303(2)	Girdhari v. Emperor	282
Bhagwan Din v. Emperor	365	Girdhari Pashi v. Emperor	387
Bhagwan Din v. Mahmud Ali	381(1)	Gobardhan v. Emperor	108
Bhagwati v. Emperor	60	Gobardhan v. Manna Lal	81
Bhana, Mt. v. Guman Singh	184	Gobardhan v. Padam Singh	357
Bharat Das v. Nandrani Kuar	431	Gobind Das v. Karan Singh	402
Bharatpur State v. Secy. of State	154	Gokul v. Mohri Bibi	72
Bharat Singh v. Tej Singh	FB 131	Gopilal v. Lakhpat Rai	38
Bhikam Singh v. Emperor	374(2)	Gordhanlalji v. Maksudan Ballabh	152
Bhup Singh v. Jai Ram	384(2)	Govind Ram v. Jwala Pershad	240
Bisheswar Nath v. Emperor	275	Gulzar Ali v. Siadat Husain	373
Buddhu Misir v. Bhagirathi Kuar	405	Gumnan v. Jahangira	393
Chabraj Singh v. Mahesh Narain Singh	259	Habeeb Ullah v. Manrup	292
Chaitan Lal v. Emperor	100(1)	*Hadiyar Khan v. Emperor	1
Champat Singh v. Mahabir Prasad	331	Hait Ram v. Ganga Sahai	126(1)
Chandan Singh v. Emperor	209(1)	Hamida Bibi v. Fatima Bibi	180
Chaturli Singh v. Ramla	290(2)	Hamid Hussain v. Kubra Begam	235
Chhote Lal v. Emperor	335	Harish Chander v. B. Ganga Bishun	336
Chiranji Lal v. Behari Lal	245	Har Kesh v. Emperor	134
Chitan Singh v. Baldeo Singh	374(1)	Harnam Singh v. Emperor	406(1)
Chithru Singh v. Bhagwant Singh	323	Har Prasad v. Tajammul Husain	290(1)
*Chunni Lal v. Narsingh Das	FB 69	Har Prasad Singh, Vakil of Banda, <i>In re</i>	SB 136
Collector of Moradabad v. M. Maqbulul Rahman	194(2)	Hasan Ali Khan v. Azharul Hasan	49(1)
Damber Singh v. Kalyan Singh	366	Hingo Singh v. Jhuri Singh	333
Dambar Singh v. Mohammad Munwar Ali	824(1)	Hirdey Narain v. Alam Singh	13
Darshan Das v. Collector of Meerut	218	Inayatullah Khan v. Hashmatullah Khan	403(2)
Data Din v. Nanku	397	Indar v. Emperor	257
Debi v. Emperor	265	Ishwari Dutt v. Emperor	318
Debi Prasad v. Badri Prasad	102(2)	Ishwar Prasad v. Emperor	133
Deodatt Singh v. Ram Charritar Jati	278	Jagardeo Singh v. Ali Hammad	177(2)
		Jagrup Shukul v. Emperor	332

NOMINAL INDEX, 1918 ALLAHABAD

Jaguji Rai v. Emperor	93	Manohar v. Emperor	85(1)
Jahangira v. Karrar Husain	252	Manphool v. Sahi Ram	426
Jaimal Singh v. Shib Saran Singh	427	Man Singh v. Mt. Gaini	377
Jai Narain Lal v. Emperor	106	Mansukh Ram v. Birjraj Saran Singh	221(2)
Jaint Singh v. Gosain	369(2)	Matan Badal Singh v. Gourish Narain Singh	249
Jhunku Lal v. Bisheshar Das	418	Mathura v. Emperor	56
Jumna Prasad v. Karan Singh	14	Mathura Prasad v. Sheobalak	419
*Jurawan v. Mahabir Dube	216(2)	Maturwa v. Emperor	390
Jwala Prasad v. E. I. Ry. Co.	415(1)	Meik, Mrs. E. E. W., <i>In the goods of</i>	306
Kali Charan Pande v. Gupt Nath Misra	274	Mewa Ram v. Narain Das	391(1)
**Kalika Baksh Singh v. Ram Charan	FB 183(2)	Mir Dad Khan v. Ramzan Khan	86
Kalka Prasad v. Emperor	271	Mithan Lal v. Chhajju Singh	268
Kallu v. Kallu Singh	382(1)	Mohni v. Baij Nath	363(1)
Kallu v. Sital	260	Moti Begam v. Har Prasad	79(2)
Kallu v. Sital	294	*Moti Chand v. Lalta Prasad	201
Kalyan Singh v. Allah Diya	221(1)	Moti Ram v. Banke Lal	339
Karimuddin v. Emperor	399	Moyan Lal v. Tika Ram	55
Kedar Nath v. Emperor	99	Mukat Lal v. Gopal Sarup	63
Khairati v. Emperor	403(1)	Municipal Board, Benares v. Gajadhar	16
Khub Chand, <i>In the matter of</i>	SB 181(2)	Muniruddin v. Samirunnissa Bibi	398
Khubi v. Bakhtayal	407	*Munna Singh v. Ausan Singh	12
Khurshed Alam Khan v. Rahmat Ullah Khan	229	Naimul Haq v. Mohammad Subhanullah	2
Kirpa Devi v. Ram Chander Sarup	238(1)	Nandlal Singh v. Beni Madho Singh	328
Kishore Singh v. Bahadur Singh	49(2)	Nanhe v. Emperor	182
Kunj Behari Lal v. Bhargava Commercial Bank	363(2)	Nanhey Mal v. Chait Ram	20
Kunj Behari Lal v. Laltu Singh	40	Nannhu v. Sri Thakurji Maharaj	23
Labhu v. Radha Charan	256	*Narain Das v. Het Singh	241
Lachhmi Kunwar v. Durgai Kunwar	74	Narain Dei, Mt. v. Mt. Parmeshwari	406(2)
Lachhmi Narain v. Bindraban	247	Narsingh Das v. Debi Prasad	254
Lachmi Narain v. Emperor	369(1)	Narsingh Sahai v. Sheo Prasad	FB 389
Lachmi Narain Dube v. Kishun Lal	308	Nasiruddin Husain v. Ashfaq Husain	71
Lakhan Singh v. Ram Kishen Das	185	Nathu v. Mt. Tulsha	342(2)
*Lakhpat Rai v. Sri Kishan Das	24	Naulakhi Kuer v. Jai Kishen Singh	255
*Lala v. Emperor	299	Net Ram v. Bhagirath Lal	368
Lala Ram v. Thakur Prasad	305	Nirbhay Lal v. Kallan	250
Lalji v. Emperor	343	Nizamuddin Shah v. Bohra Bhim Sen	76
Lalta Prasad Chaudhry v. Gokul Prasad	429(1)	Nur Uddin Khan v. Pran Kishan Chakravarty	96
Liaqat Husain v. Emperor	258(2)	Orde, L. W. v. Secy. of State	126(2)
Madan Lal v. Manzur Ahmad	317	Pahlwan Singh v. Mt. Janki	391(2)
Madho v. Emperor	238(2)	People's Industrial Bank, Ltd. v. Har-kishan Lal	342(1)
Magan Lal v. Ganesh Prasad	372	Pirthi Singh v. Laiq Singh	350
Mahabir v. Emperor	95	Pita Ram v. Jujhar Singh	346
Mahabir Rai v. Sarju Prasad Rai	175	*Powell, F. B. v. S. Sen	121
Mahadeo Singh v. Emperor	17	Premgir v. Emperor	298
*Maba Ram v. Emperor	168	Prem Sukh Das v. Lachmi Tewari	94
Mahmud Ali v. Tamizunnissa Bibi	9	Pule Bishunath Rai v. Bramhanand Swami	208
*Mahomed Ali Khan v. Raja Ram Singh	109(1)	Puttu Lal v. Ram Sarup	396
Mahomed Husain Khan v. Hanuman	392	Qasin Ali Khan v. Mt. Bhagwanta Kuar	394
Mahomed Iltifat Husain v. Alimunnissa	97(1)	Radhey Lal v. Bhawani Ram	359
Mahomed Iltifat Husain v. Alimunnissa	105	Raghunandan Lal v. Badan Singh	242
Mahomed Isa Khan v. Mahomed Khan	410	Raghunath v. Emperor	100(2)
Mahomed Ishaq Khan v. Mahomed Rustom Ali Khan	412	Raja Ram Singh v. Emperor	125
Mahomed Niaz Khan v. Mahomed Adrees Khan	263	Ram Baran Rai v. Har Sewak Dube	246
Mahomed Raziuddin v. Raghubir Prasad	376	Ram Chandra Naik v. Raghunath Saran	327
Mahomed Said v. Emperor	258(1)	Ram Das v. Emperor	124
Mahomed Zaki v. Municipal Board of Mainpuri	177(1)	Ram Dass v. Emperor	279
Mahu v. Emperor	102(1)	Ram Dulari v. Hardwari Lal	219
*Makhan v. Emperor	303(1)	Ram Faqir v. Bindeshri Singh	52
Makhan Lal Parsottam Das v. Chunni Lal Brij Lal	11	Ramji Das v. Bhagwan Das	176
Makhan Singh v. Jahan Kuar	381(2)	Ram Kishan v. Emperor	215
Mangal Prasad v. Nabi Bakhs	371	Ram Lakhan Das v. Shankar Singh	289
Manik Chand v. Emperor	320(2)	Ram Nath v. Sekhdar Singh	210
Man Mohan Lal v. Gopi Nath	325	Ram Prasad v. Emperor	68
Mannulal v. Nelin Kumar Mukerji	21(2)	Ram Richcha Prasad Tewari v. Raghunath Prasad Tewari	379
		Ram Sabai v. Emperor	329
		Ram Sambhart Tewari v. Rajman Naik	233
		Ram Saran Lal v. Emperor	307
		Ramzan v. Bhukhal Rai	226(1)

Ramzan v. Mt. Ram Dalva	408	Sukh Lal v. Nannoon Prasad	855(2)
Ratan Moti v. Tilak Chand	388	Sukru v. Emperor	181(1)
Ratan Singh v. Khem Karan	228(1)	Sundar Kunwar v. Ram Ghulam	286
Raushan Lal v. Kanhaiya Lal	61	Sundar Nath v. Emperor	186(2)
Sahadeo Rai v. Emperor	409	Sunder Lal v. Banarsi Das	401(2)
Sajjadi Begam v. Dilawar Husain	98	Suraibali Singh v. Mohammad Nasir	227
Salamatuzzamani Begam, Mt. v. Masha Allah Khan	211(2)	Suraj Bhan v. Hashim Begam	319
Satola v. Emperor	267	Surendra Nath v. Emperor	160
Shamsher Singh v. Pearey Dut	188	Tamizunnissa Bibi v. Najju	92
Shankar Lal v. Ram Babu	288	Tapti Prasad v. Emperor	429(2)
Sheobans Singh v. Emperor	855(1)	Thakurdas v. Abdulla	67(2)
Shoo Prasad Singh v. Mt. Premma Kuar	209(2)	Thakur Das v. Emperor	345
Shyam Lal v. Ram Charan	244	Tilak Ram v. Dalip Singh	243
Sital v. Emperor	322	Tota Ram v. Gopal Singh	401(1)
Sripat Narain Rai v. Tirbeni Misra	226(2)	Umrao Singh v. Umrao Singh	1356
Sukha v. Emperor	97(2)	Wazir Ali v. Ali Islam	386
		Yusuf Husain v. Emperor	169

SUBJECT INDEX

Absence of Star denotes Cases of Provincial or Small Importance.

* Indicates Cases of Great Importance.

** Indicate Cases of Very Great Importance.

Agra Tenancy Act (2 of 1901)

—Ss. 4 and 158—Admitted tenancy—Land in S. 158 includes land other than land as defined in S. 4 410b

—S. 10—Transfer of Property Act (1882), S. 91—Usufructuary mortgage of *sir* plots—Proprietary rights sold in execution of decree—Purchaser also purchasing mortgagee's rights—Mortgagor as ex-proprietary tenant is entitled to redeem under S. 91 392

—S. 10—Mortgage—Construction—Usufructuary mortgage of zamindari—Mortgagee giving lease for term of mortgage of same—Suit for arrears of rent by mortgagee—Equity of redemption sold in execution of decree—Subsequent suit for arrears of rent—Mortgagor is liable to pay rent as long as mortgage lasted whether or not became exproprietary tenant of zamindari 268

—S. 10—Defendant, joint-proprietor in mahal, mortgaging his *sir* and khudkasht lands to plaintiff and then entering into agreement to pay certain rent in respect of those lands—Assistant Collector accepting that rent as fair rent under S. 36, U. P. Land Revenue Act—Plaintiff suing for rent on basis of that agreement—Defendant is estopped from objecting that other cosharers should have joined in suit—It was competent to Assistant Collector to accept agreement of rent between parties—U. P. Land Revenue Act (1901), S. 36 252a

—S. 10—S. 10 fixes maximum rent but there is nothing in it to prevent parties from contracting lower rent, provided it is accepted by Collector 252b

Agra Tenancy Act

—Ss. 10, 20 and 21—Object of S. 10 is to secure and preserve right of occupancy to ex-proprietor—Mortgage of *sir* land—Covenant to put mortgagee in possession—Simultaneous deed of relinquishment of rights of ex-proprietary tenancy—Transactions in two deeds are in substance one and are void 86

—Ss. 20 and 22—Scheme of inheritance in S. 22 overrides ordinary Hindu law of inheritance—Tenancy acquired by one member—Profits thrown into common stock—Tenancy does not become in favour of all members 294a

—S. 20—Transfer of occupancy holding is not permissible except under S. 20 294b

—S. 20—Illegal usufructuary mortgage of occupancy tenancy—Suit to redeem held maintainable 226(1)

—Ss. 20 (2) and 25 (1)—Lease bona fide after execution but before registration of mortgage—Lease is valid under S. 20 (2) and mortgage inoperative under S. 25 (1) 292

—S. 22—Joint holding cultivated separately in small portions—Widow succeeding to portion—On her death nearest reversioners, cultivating other portions can be said to share in cultivation under S. 22 and are entitled to succeed—If not under S. 22 they are entitled to succeed under Hindu law 384(2)a

—Ss. 34 and 199—Usufructuary mortgage of *sir* lands before Act—Suit by mortgagee in Revenue Court to eject defendant alleged to be non-occupancy tenant—Relationship of landlord and te-

Agra Tenancy Act

tenant denied by defendant who had acquired part of equity of redemption of mortgaged land—Question of title referred to civil Court which held that plaintiff was entitled to exclusive possession—Revenue Court consequently ejecting defendant holding him to be non-occupancy tenant—No appeal lies to District Judge—Defendant held rightly ejected

177(2)a

—S. 34—"Person occupying land without consent of landlord"—Meaning explained

177(2)b

—S. 57—Trees on occupancy holding cut down—Act cannot be presumed to be detrimental to land

221(2)b

—Ss. 95 and 177 (f)—Plaintiff being directed by civil Court under S. 202 to bring suit in Revenue Court—Plaintiff filing suit under S. 95—Defendant objecting as to jurisdiction but objection overruled—Appeal does not lie to District Judge

84

—Ss. 98 and 167—Suit for declaration that defendant and other persons are zamindars and plaintiff is occupancy tenant—Jurisdiction of civil Court is barred

317b

—S. 150—Holder of perpetual istim-rari lease is proprietor and is entitled to resume muafi

249

—Ss. 156 and 158—Suit for assessment of rent does not fall outside scope of S. 156—Interpretation of statutes, Headings

264

—S. 158—Applicability—Rent free grant to mahant without dedication either of land or profit therefrom to deity—Land held by more than two successors of mahant—Provisions of section apply—Land must be deemed to be held in proprietary right by mahant

431

—S. 158—Applicability—Section applies to piece of grove land ceasing to be grove more than 12 years before Act of 1901 came into force

410a

—Ss. 158 and 4—Admitted tenancy—Land in S. 158 includes land other than land as defined in S. 4

410b

—Ss. 158 and 193—Claim for declaration of title to muafi dismissed—On appeal plaintiff held rent free grantee of occupancy land held by him—Case remanded for determining revenue—No second appeal lies

349

—Ss. 158 and 167—Suit to declare muafi rights as proprietary rights—Reve-

Agra Tenancy Act

nue and not civil Court has jurisdiction

23

—S. 164—Profits of *sir* and khudkasht land—Some cosharers neglecting to cultivate their share—They are not entitled to call upon other cosharers to account for profits of their share of *sir* or khudkasht unless they are cultivating area in excess of their share

270

—S. 164—Suit to recover share of profits from lambardar—Death of lambardar—Legal representative is also liable for profits remaining uncollected due to neglect of lambardar—Liability is limited to assets of deceased in hands of legal representative

(FB) 131

—S. 167—Occupancy tenant cutting down trees belonging to landlord—Suit for damages held cognizable by Court of Small Causes—Suit is not barred under S. 167

221 (2)a

—S. 167—Defendant suing in Revenue Court for ejectment of plaintiff alleging that latter was sub-tenant and obtaining decree—During pendency of suit plaintiff bringing civil suit for declaration that he was co-owner—Civil suit is not maintainable

49 (2)b

—S. 167—Civil P. C. (1908), S. 115—Matters under Agra Tenancy Act—High Court has no revisional powers

14

—S. 175—S. 175 applies to appeal whether to Civil or Revenue Court

238 (1)b

—Ss. 177 and 198—Suit for ejectment—Tenant denying plaintiff's proprietary title—Suit dismissed—Appeal lies to District Judge

290 (1)

—S. 177—Order staying or refusing to stay suit under para. 18, Sch. 2, Civil P. C., is not decree and no appeal lies

238 (1)b

—S. 194—Private partition of vague nature is not enough to take a case out of S. 194

357a

—S. 194—Suit for rent by cosharer—Proof of special contract is necessary to entitle to sue

357b

—S. 197—Subordinate Judge empowered to hear appeals from decisions of Munsif is competent to take action under S. 197—Bengal, N. W. P, and Assam Civil Courts Act (12 of 1887), S. 21

350

—Ss. 199 and 34—Usufructuary mortgage of *sir* lands before Act—Suit by mortgagee in Revenue Court to eject defendant alleged to be nonoccupancy tenant—Relationship of landlord and

Agra Tenancy Act

tenant denied by defendant who had acquired part of equity of redemption of mortgaged land—Question of title referred to civil Court which held that plaintiff was entitled to exclusive possession—Revenue Court consequently ejecting defendant holding him to be non-occupancy tenant—No appeal lies to District Judge—Defendant held rightly ejected

177 (2)*a*

---S. 201—Suit for profits—Plaintiff not recorded cosharer—Still suit is maintainable—Procedure laid down

427

Allahabad High Court Rules

—Ch. 3, R. 2—Scope—It does not affect or alter S. 12, Limitation Act—Time required to obtain copy of judgment cannot be excluded—Limitation Act (9 of 1908), S. 12

(FB) 339*b*

—Ch. 21, Rr. 21 and 25—Defendant objecting to Court's jurisdiction—Point of jurisdiction decided and plaint returned for presentation to proper Court with costs to defendant—Pleader's fees can properly be calculated under R. 21

183 (1)

Appeal

—Right of legal representative of deceased party cannot appeal without obtaining order bringing him on record

309*c*

—Maintainability—Cross-appeal—Suit for possession of half share in each of two groves in different villages—Suit in respect of one grove dismissed and decreed in respect of other—Appeal by both parties—Plaintiff's appeal dismissed, defendant's allowed, case being remanded—Plaintiff could appeal against order of remand

52*a***Arbitration**

—Award—Failure to sign by arbitrator of one party, does not invalidate award

426

Arms Act (11 of 1878)

—Ss. 19 (f) and 30—Offence punishable under S. 19 (f)—Power of search—How to exercise explained

118*b*

—Ss. 19 (f) and 30—Search without warrant by police officer specially empowered to conduct searches, is not illegal

113*c*

—S. 19 (f)—Minor in possession of arms without license is guilty under S. 19 (f)

107

Assignment

—Rights of assignee—Assignee suing on assignment and proving it—Adverse party cannot deny consideration—Rule

Assignment

does not apply when transferor being party to litigation pleads that it is fictitious

371*a***Bengal Land Redemption and Foreclosure Regulation (17 of 1806)**

—S. 8—Mortgage by way of conditional sale—Foreclosure proceedings—Notice of service—Record of proceedings under Regulation cannot be accepted as proof of service

246

Bengal N. W. P. and Assam Civil Courts Act (12 of 1887)

—S. 21—Agra Tenancy Act (2 of 1901) S. 197—Subordinate Judge empowered to hear appeals from decisions of Munsif is competent to take action under S. 197

350

Cattle Trespass Act (1 of 1871)

—S. 22—Municipal servant impounding cattle of complainant—No damages to Municipal trees—Servants are liable to pay compensation under S. 22

267*b***Christian Marriage Act (15 of 1872)**

—Construction—Care must be taken that no one is brought within Act who is not within its express language

168*a*

—Object is not to prevent people marrying as they wish

168*h*

*—S. 3—Person professing Christian religion—Who is not illustrated

168*e*

—Ss. 4 and 68—It is not criminal for Christian to marry by ceremony void under S. 4—Scope of S. 63

168*g*

—S. 68—S. 68 must be interpreted in harmony with context

168*o*

—Ss. 68 and 3—No one except person professing Christian religion comes within purview of S. 68

168*d*

—S. 68—Whether S. 68 is intended to penalize marriages not under the Act—*Quaere*

168*b*

—S. 68—Christian can marry non-Christian by non-Christian ceremony

168*i*

Civil Procedure Code (1908)
—S. 11—Provincial Insolvency Act (1907), S. 22—Application under S. 22 is suit within meaning of Civil P. C.

346*b*

—Ss. 11 and 47 and O. 34, R. 5—Suit on mortgage—Subsequent purchaser setting up prior mortgage redeemed by him—His claim recognized by preliminary decree but not included in final decree—Property sold and purchased by decree-holder—Suit by subsequent purchaser for possession till his lien is paid off is barred both under Ss. 11 and 47

339

—S. 11—Mortgage of muafi zabti sarkari—Sale in execution of mortgage decree, mortgagor being proprietor—Re-

Civil P. C.

venue papers describing him as tenant
 —Mortgagee-auction-purchaser obtaining formal possession—Application for mutation rejected—Suit for possession—Mortgagor is precluded from pleading that his interest was not saleable 278
 —S. 11 and O. 34, R. 1—Person claiming paramount title is not necessary party—Question of paramount title cannot be decided—Subsequent suit for declaration of paramount title to mortgage property by subsequent mortgagee is not barred by *res judicata* 81
 —S. 11, *Expl.* 2—Suit of small cause nature tried and decided as regular suit—Subsequent suit involving same question is *res judicata* 52b
 —S. 11, *Expl.* 5 and O. 2, R. 2 and O. 20, R. 12—Suit for possession and mesne profits—Subsequent suit for mesne profits from date of institution of suit up to delivery of possession is not barred 412a
 —S. 24 (4)—Suit of small cause nature—Suit transferred from Sub-Judge with small cause powers to Munsif without such powers—Court as regards the suit is Court of Small Causes—Decision is not appealable — Provincial Small Cause Courts Act (9 of 1887), S. 35 290 (2)
 —S. 47—Mortgage suit against father and son—Absence of necessity—Money decree passed—Son "exempted" and given costs—Son's estate attached—Son's objection allowed—Suit for declaration that son's share could be sold on ground of pious obligation to pay father's debt—Previous decree discharged son, and fresh suit was barred under S. 47 397
 —S. 47 and O. 41, R. 1—Order under S. 47—Appeal—Copy of judgment and decree must be filed—Order under S. 47 being decree, appeal therefrom is governed by O. 41 394b
 —Ss. 47 and 11 and O. 34, R. 5—Suit on mortgage—Subsequent purchaser setting up prior mortgage redeemed by him—His claim recognized by preliminary decree but not included in final decree—Property sold and purchased by decree-holder—Suit by subsequent purchaser for possession till his lien is paid off is barred both under Ss. 11 and 47 339
 *—S. 48—"Subsequent order directing payment of money" refers to order of Court passing decree and not of Court executing it—Order of Court granting time to judgment-debtor does not extend time—Civil P. C. (1908), O. 20, R. 11 216 (2)a

Civil P. C.

—S. 48—S. 48 does not in strict sense provide period of limitation 216 (2)b
 —S. 48—Limitation Act (1908), S. 15—"Prescribed" refers to periods prescribed by that Act and does not apply to Civil P. C. 216 (2)d
 —S. 60 (c) and O. 21, R. 92—Objection under S. 60 (c) cannot be raised in defence in suit for possession by auction purchaser obtaining formal possession, if no objection was raised in execution 305
 —S. 60 (f)—Birt jijmani is right to personal service and is exempt from attachment 380
 —S. 60 (f)—Decree on mortgage executed by agriculturist—House not appurtenance of holding is liable to be sold in execution of decree 250a
 —S. 64—Order staying sale set aside on ground of fraud—Sale held during existence of order is valid 384 (1)
 —S. 73—Suit for refund of money improperly awarded before actual distribution is not maintainable 327a
 —S. 73 — Mode of distribution illustrated 327b
 —S. 92—Mismanagement of religious trust — District Judge cannot interfere on application of private person until regular suit is filed—Code lays down regular procedure for suit 218
 —S. 92—S. 92 is mandatory and suit claiming any relief in S. 92 must be brought in conformity with its provisions 2b
 —S. 104 (2) and O. 21, R. 90—No second appeal lies against order refusing to set aside sale 209(2)
 —S. 110—Cross-appeals to High Court—High Court affirming part of decree and reversing part — Leave cannot be granted in respect of part affirmed if no question of law is involved 245
 —S. 115 and O. 7, R. 10 — Order for presentation to proper Court confirmed on appeal—No second appeal lies—Appellate Court committing error in exercise of jurisdiction—High Court will not interfere in revision 415(1)
 —S. 115—Revision—Non-complicated question of fact or law — Applicant entitled to obtain possession under O. 21, R. 95, Civil P. C.—High Court will interfere though another remedy open—Civil P. C., O. 21, R. 95 405b
 —S. 115—Mistake of law is no ground for revision 186(1)

Civil P. C.

—S. 115 — Criminal P. C. (1393), Ss. 195, 439 and 476—Sanction for prosecution for perjury granted by civil Court—High Court has no power to set it aside either under S. 439 or under Civil P. C. (1908), S. 115 68

—S. 115 — Matters under Agra Tenancy Act—High Court has no revisional powers—Agra Tenancy Act (2 of 1901), S. 167 14

—S. 122 — Scope of power to make rules—No power to touch Limitation Act exists (FB) 389a

—S. 146 and O. 21, R. 95—Transferee from auction-purchaser can apply for possession of property transferred 405a

—Ss. 151 and 152 — Decree as drawn up quite incorrect and unjust — Refusal to amend decree amounts to refusal to exercise jurisdiction vested in Court 208

—S. 152 — Amendment of decree — Decree affirmed by appellate Court—To get amendment variance between appellate judgment and decree must be shown 341

—S. 152—Certain terms embodied in decree — Court passing cannot alter it except on application for review of judgment 98

—S. 152—Mortgage decree—Property assessed to small revenue — Decree describing property as muafi—In execution, purchaser of property in execution of money-decree objecting that property not being revenue free was not the property mortgaged—Obejector not deceived burden being notified at time of his purchase—Court can correct decree 78

—O. 1, R. 3 and O. 23, R. 1—Multifariousness—What is, explained — Defect of multifariousness is technical and suit can be allowed to be withdrawn 425a

—O. 2, R. 2 and O. 20, R. 12 and S. 11, Expl. 5—Suit for possession and mesne profits—Subsequent suit for mesne profits from date of institution of suit up to delivery of possession if not barred 412a

—O. 3, R. 4, O. 21, R. 89 and O. 32, R. 5—High Court can revise conclusions of fact or of law bearing on questions of jurisdiction — Application to set aside sale filed by pleader appointed by guardian ad litem of minor — Vakalatnama

Civil P. C.

failing to state that guardian was executing it as such — Application rejected — Revision is competent 422

—O. 5, Rr. 17 and 19—Summons fixed to outer door of defendant—Defendant is not duly served until order under R. 19 is made by Court 331a

—O. 6, R. 14—Plaint signed by prisoner in contravention of jail regulations is as good as any other plaint 275a

—O. 7, R. 10 and S. 115 — Order for presentation to proper Court confirmed on appeal—No second appeal lies — Appellate Court committing error in exercise of jurisdiction—High Court will not interfere in revision 415(1)

—O. 9, Rr. 3 and 6 and O. 17, Rr. 2 and 3—Suit fixed for evidence — Defendants absent—One plaintiff who was also agent of others present but not adducing evidence — Suit dismissed for "want of prosecution"—Application for restoration dismissed — Separate suit was barred under O. 17, R. 3 — "Want of prosecution" meant absence of evidence 333

—O. 9, R. 3 and O. 34, R. 5—Application for final decree dismissed in default—Fresh application lies 285a

—O. 9, Rr. 3 and 4—Dismissal for default for second time is no ground to refuse restoration 176a

—O. 9, R. 4 — No appeal lies against order under R. 4—It cannot be indirectly allowed by treating appeal as revision 176b

—O. 9, R. 13—Ex parte decree against defendant—Defendant not "duly served"—Defendant is entitled to have decree set aside 331b

—O. 11, Rr. 6, 7 and 21—Interrogatories objected as irrelevant — Court must decide the question before requiring party to answer or refuse 303 (2)

—O. 13, R. 4 — Document produced must be endorsed by Court whether proved or admitted—It cannot otherwise form part of record 244b

—O. 13, R. 10 and O. 41, R. 23—Application under O. 13, R. 10, to send for patwari's record summarily rejected and suit dismissed—Suit held not properly tried 375

Civil P. C.

—O. 17, *Rr.* 2 and 3 and O. 9, *Rr.* 3 and 6—Suit fixed for evidence—Defendants absent—One plaintiff who was also agent of others present, but not adducing evidence—Suit dismissed for “want of prosecution” — Application for restoration dismissed—Separate suit was barred under O. 17, *R.* 3 — “Want of prosecution” meant in absence of evidence 333

—O. 20, *R.* 11 and S. 48—“Subsequent order directing payment of money” refers to order of Court passing decree and not of Court executing it—Order of Court granting time to judgment debtor does not extend time 216 (2)*a*

—O. 20, *R.* 12 and O. 2, *R.* 2 and S. 11, *Expl.* 5—Suit for possession and mesne profits—Subsequent suit for mesne profits from date of institution of suit up to delivery of possession is not barred 412*a*

—O. 20, *R.* 15 — Personal representative of deceased partner is bound to give account of what has been received on behalf of partnership—Liability extends to assets received 288

—O. 21, *R.* 7 and O. 22, *R.* 6—Decree against dead man is nullity 226 (2)

—O. 21, *R.* 11 (2)—Application fulfilling requirements of *R.* 11—Application is good if copy of decree is subsequently filed and saves limitation — Limitation Act (9 of 1908), Art. 182. 242

—O. 21, *R.* 32—Decree for injunction is to be executed as provided by O. 21, *R.* 32 — Execution cannot be effected through police—Decree passed with regard to hereditary office binds legal representatives 152

—O. 21, *R.* 58—Objection dismissed without investigation—Case is taken out of one year’s rule of limitation—Claim under O. 21, *R.* 58—Other party disputing claim—No evidence produced by claimant—Objection dismissed — Dismissal cannot be said to be without investigation—Limitation Act (1908), Art. 11 72

—O. 21, *R.* 63—Suit under — Value of suit for jurisdiction is value of decree sought to be executed and not value of property attached—Suits Valuation Act 324 (2)

—O. 21, *R.* 89, O. 3, *R.* 4 and O. 32, *R.* 5—High Court can revise conclusions of facts or of law bearing on questions of jurisdiction—Application to set aside sale filed by pleader appointed by guardian ad litem of minor—Vakalatnama failing

Civil P. C.

to state that guardian was executing it as such application rejected — Revision is competent 422

—O. 21, *R.* 89—Limitation Act (1908), S. 18 and Art. 166—S. 18 applies only where person having right to make application has been by fraud kept from knowledge of his right 336

—O. 21, *Rr.* 89 and 92 — Whether *R.* 89 is complied with or not is question which Court has jurisdiction to decide and no revision lies even if its decision is erroneous — Judgment-debtor depositing money in treasury as Court was closed — Court refusing to set aside sale on ground that deposit had not been made in civil Court—Court had jurisdiction to decide whether deposit had been made in Court — No revision is competent even if decision is wrong 192*a*

—O. 21, *Rr.* 89 and 92—Sale set aside — Auction-purchaser has right to appeal 192*b*

—O. 21, *R.* 90 and S. 104 (2)—No second appeal lies against order refusing to set aside sale 209 (2)

—O. 21, *Rr.* 91, 92 and 93—Property sold twice over—Suit by second purchaser to recover purchase money is maintainable 296 (2)

—O. 21, *R.* 92 — Decree-holder purchaser in mortgage decree for sale—Compromise between judgment-debtor and purchaser — Sale set aside — Court has power to do so 367

—O. 21, *R.* 92 and S. 60 (c) — Objection under S. 65 (c) cannot be raised in defence in suit for possession by auction-purchaser obtaining formal possession, if no objection was raised in execution 305

—O. 21, *Rr.* 92, 91 and 93—Property sold twice over—Suit by second purchaser to recover purchase money is maintainable 296 (2)

—O. 21 *Rr.* 92 and 89—Sale set aside — Auction purchaser has right to appeal 192*b*

—O. 21, *R.* 95 and S. 146—Transferee from auction-purchaser can apply for possession of property transferred 405*a*

—O. 21, *R.* 95 and S. 115—Revision—Non-complicated question of fact or law — Applicant entitled to obtain possession under O. 21, *R.* 95, Civil P. C. — High Court will interfere though another remedy open 405*b*

—O. 22, *R.* 3 — Mortgage suit remains suit till final decree is passed — Suit

Civil P. C.

abates on death of defendant after such decree without legal representative being brought on record 761c
 —O. 22, R. 6 and O. 21, R. 7—Decree against dead man is nullity 226(2)
 —O. 23, R. 1 and O. 1, R. 3 — Multifariousness—What is explained — Defect of multifariousness is technical and suit can be allowed to be withdrawn 425a
 —O. 23, R. 1—Leave to withdraw can in suitable case be granted in second appeal 425b
 —O. 23, R. 1 — Leave to withdraw when should be granted explained—Mere award of costs is not sufficient compensation — Trial Court has to determine whether "sufficient ground" for passing order exists 418a
 —O. 23, R. 1 — Trial Court making mistake of jurisdiction — High Court is not entitled to interfere 418b
 —O. 23, R. 1 — Suit for partition — Plaintiff asking house to be sold—Defendant offering to purchase—Price fixed — Application for withdrawal of suit held rightly dismissed as too late — Partition Act (4 of 1893), Ss. 2 and 3 356
 —O. 32, R. 2 — Plaint filed by minor without next friend—Election to proceed after attaining majority—Presentation of plaint held proper 71
 —O. 32, R. 5, O. 3, R. 4 and O. 21, R. 89 — High Court can revise conclusions of facts or of law bearing on questions of jurisdiction— Application to set aside sale filed by pleader appointed by guardian ad litem of minor—Vakalatnama failing to state that guardian was executing it as such application rejected — Revision is competent 422
 —O. 33, R. 8— Person obtaining leave to sue in forma pauperis adjudicated insolvent — Receiver can continue suit — Provincial Insolvency Act (1907), S. 20 177(1)
 —O. 34, R. 1 — Person claiming paramount title is not a necessary party — Question of paramount title cannot be decided—Subsequent suit for declaration of paramount title to mortgage property by subsequent mortgagee is not barred by res judicata—Civil P. C., S. 11 81
 —O. 34, Rr. 4, 5 and 10—Mortgage — Suit on — Successful plaintiff ordinarily gets costs against mortgaged property and not personally against defendant 366a
 —O. 34, R. 5 and Ss. 11 and 47—Suit on mortgage—Subsequent purchaser set-

Civil P. C.

ting up prior mortgage redeemed by him — His claim recognized by preliminary decree but not included in final decree — Property sold and purchased by decree-holder—Suit by subsequent purchaser for possession till his lien is paid off is barred both under Ss. 11 and 47 339
 —O. 34, R. 5 — Application for final decree is not one in execution—Fresh application after dismissal of first is not revival of execution 285b
 —O. 34, R. 5— Limitation Act (1908), Art. 182 — Art. 181 governs application for final decree — Limitation runs from expiry of period fixed by preliminary decree for payment 285c
 —O. 34, R. 6 — Application under O. 34, R. 6 is application in original suit for new decree and cannot be regarded as application for execution—Application is governed by Limitation Act (1908), Art. 181 105
 —O. 34, R. 6—Order refusing to make decree under O. 34, R. 6 is decree — Appeal must bear ad valorem court-fees — Court-fees Act (1870), Sch. 2, Art. 1 97(1)
 —O. 40, R. 1 — Suit on simple mortgage—No receiver can be appointed even pending appeal by mortgagor 240
 —O. 41, R. 1—Copy of decree appealed from must accompany memo of appeal 394a
 —O. 41, R. 1 and S. 47—Order under S. 47— Appeal — Copy of judgment and decree must be filed— Order under S. 47 being decree—Appeal therefrom is governed by O. 41 394b
 —O. 41, R. 23 and O. 13, R. 10— Application under O. 13, R. 10 to send for patwari's record summarily rejected and suit dismissed — Suit held not properly tried 375
 —O. 41, R. 35—Mortgage suit — Costs to be recoverable out of property and not personally against party— Decree should so state expressly 366b
 —O. 43, R. 1 (a) — Order returning memo of appeal for presentation to proper Court is not appealable 96a
 —O. 44, R. 1 — Application under O. 44, R. 1, rejected under proviso— Applicant is entitled to pay court-fee on memorandum of appeal 194(1)
 —O. 47, Rr. 7 and 1—Appeal from order granting review on allegations that review application was made after expiry of period of limitation—Before allowing

Civil P. C.

appeal Court must come to finding that application was made beyond time without sufficient cause 229

—*Sch. 2, Paras. 14 and 15*—Evidence recorded by six arbitrators—Two arbitrators withdrawing before decision—Remaining arbitrators after notice to defendants but in their absence recording fresh evidence and giving award—Award invalid 274

Companies Act (7 of 1913)

—S. 155—Companies Act (1882), S. 169—Winding up of company commencing before new Act coming into operation—Company must be wound up according to old Act 342(1)a

—S. 169—Winding up of company commencing before new Act coming into operation—Company must be wound up according to old Act—Companies Act (1913), S. 155 342(1)a

*—S. 184—Person taking shares on stipulation that he would be made Director—If condition not fulfilled he does not become contributory on liquidation 121a

*—S. 184—No complaint about delay in allotment of shares voluntarily purchased—On liquidation he becomes contributory—Delay in allotment cannot be pleaded 121b

—S. 184—No reply to letter of allotment is required by law to be given 121c

Company

—Winding up—Order directing preferential payment to be made to creditor of bank in liquidation is incident of winding up—Right of appeal is also incident of winding up 342(1)b

Compromise

—Stamp Act (1899), S. 62—Petition stating terms of compromise between parties and praying for decree does not require engrossed general stamp 307

Compromise decree

—Plaintiff required to deposit certain sums in Court within certain period—Remittance by money order held did not amount to deposit—Hypothecated property held liable to be sold but remittance not being payment under compromise plaintiff could not execute decree 403(2)

Contract

—Liability—Agreement acted upon—Equity will support transaction although imperfect 211(2)a

Contract Act (9 of 1872)

—S. 21—Agreement by widow of Hindu joint family to share estate equally based on wrong view of law—Agreement is liable to be set aside on ground of common mistake 74

—S. 23—Agreement to finance litigation and share fruits thereof ought to be carefully watched 37b

—S. 69—Sale of mortgaged property—Vendee retaining part of consideration to pay off mortgage—Suit for pre-emption—Pre-emptor directed to deposit full consideration—Vendee withdrawing deposit—Failure of vendee to discharge mortgage—Mortgage paid off by pre-emptor—Suit by pre-emptor to recover mortgage amount from vendee is not maintainable 379

—S. 69—Independent trespasser trespassing by virtue of separate deeds are not liable to contribute towards cost of suit for ejectment by owner against them jointly when one has not contested the claim 328

—S. 70—Purchaser paying more amount than left with him to mortgagee—Vendee is not entitled to set off in suit for recovery of unpaid consideration by vendor 319

—Ss. 107 and 176—Pawnee's right of sale is analogous to seller's right of resale 363(2)b

—S. 176—Pawnee need not give pawnor information of actual date, time and place of sale—Pawnee has only to give reasonable time within which right of redemption is to be exercised 363(2)a

—Ss. 176 and 107—Pawnee's right of sale is analogous to seller's right of resale 363(2)b

—S. 42 (a) (h) (5)—Jurisdiction of civil Court—Liquidator passing order under S. 42—Civil Court must enforce order—Order of civil Court is not appealable 419a

Co-operative Societies Act (2 of 1912)

—S. 42 (a)—Jurisdiction of liquidator—Liquidator cannot pass order making debtors jointly and severally liable but determine contribution by debtor to money required for discharge of debts 419b

Court-fees Act (7 of 1870)

—S. 7 (i) and (vi)—Suit to pre-empt five villages on payment of Rs. 2,500—Suit decreed in respect of two villages on payment of Rs. 2,100 and dismissed as to remainder—Appeal is divisible in two

Court-fees Act

parts—Appellant must pay ad valorem as to part relating to two villages on amount sought to be reduced—As to other it is to be paid under S. 7 (vi)

232

—S. 7 (4) (c)—Mortgage suit—Defendant claiming prior charge—Suit decreed—Defendant appealing, praying for declaration that he had prior charge and that property should be subject to that charge—Defendant must pay ad valorem court-fee on amount of charge

79(2)

—Ss. 19 (8) & 19 (1) and Sch. 1, Art. 11

—No court-fee is payable for probate whether net assets after deductions mentioned in Sch. 3-B is less than Rs. 1,000

306

—Art. 1—Cross-objection—Ad valorem fee on amount claimed is payable

185

—Sch. 1, Art. 1—Civil P. C. (1908), O. 34, R. 6—Order refusing to make decree under O. 34, R. 6 is decree—Appeal must bear ad valorem court-fees

97(1)

—Sch. 2, Arts. 5 and 17 (iii)—Suit for declaration of occupancy rights fails under Art. 5 and not under Art. 17 (iii)

228(1)

—Sch. 2, Arts. 17 (iii) and 5—Suit for declaration of occupancy rights falls under Art. 5 and not under Art. 17 (iii)

228(1)

Criminal Procedure Code (5 of 1898)
—S. 4 (h)—Accused presenting petition to District Magistrate making allegations against Tahsildar—Magistrate treating it as complaint and recording statement of accused on oath in which latter making specific allegations of extortion and bribery—Petition held amounted to complaint

345b

—Ss. 15, 16 and 350—Rules framed by U. P. Government under S. 16 held to be intra vires—Trial before Bench of Magistrates—Judgment by Bench other than Bench hearing evidence is illegal

56

—S. 103—Search of house—Evidence of witness present at search—Court is not bound to accept

113a

—S. 106—District Magistrate not as appellate Court, but while considering question of enhancement of sentence has no jurisdiction to pass order under S. 106

216(1)

—S. 107—Demand of security—Information given to Magistrate that accused intended to hold market on their land—No information given that they intended to commit breach of peace by

Criminal P. C.

wrongful act—Order under S. 107 is illegal

102(1)

—S. 107—Conviction under S. 147, Penal Code—District Magistrate in appeal cannot order accused to give security for good behaviour—Order directing particular person to be surety is also invalid

95

—Ss. 107 and 112—S. 112 is to be read with S. 107—First Class Magistrate getting information that person is likely to disturb public tranquillity—Information not giving any wrongful acts—Magistrate considering information reliable—He has jurisdiction to make order under S. 112

93

—S. 110—Person possessing influence and promoting litigation is not so dangerous or desperate within S. 110

318

—S. 110—Legal Practitioners Act (1879), S. 36—Principles applicable to cases under S. 110, Criminal P. C., apply to cases under S. 36

271b

—Ss. 110 and 123—S. 123 does not apply when security is furnished

215

—S. 110—Order under S. 110 requiring sureties to be "approved sureties"—Sureties residing in another police district and helping accused in defence is no ground for refusing

108

—S. 110 (f)—Allegation that person committed certain offence must be proved by relevant evidence—Evidence of general repute will not suffice

257a

—Ss. 112 and 107—S. 112 is to be read with S. 107—First Class Magistrate getting information that person is likely to disturb public tranquillity—Information not giving any wrongful acts—Magistrate considering information reliable—He has jurisdiction to make order under S. 112

93

—S. 117—Fact that person is desperate and dangerous cannot be proved by evidence of general repute

257b

—Ss. 118 and 514—Surety offering house property as security can be accepted

182

—Ss. 123 and 110—S. 123 does not apply when security is furnished

215

—S. 125—District Magistrate can for sufficient reasons cancel bond for keeping peace provided bond is given on order by subordinate Court

343a

—Ss. 145 and 435 (3)—Proceedings without legal foundation taken in name of proceedings under Ch. 12—High Court can interfere

186(2)b

Criminal P. C.

—Ss. 191 and 200—Defence of India Act (1915), S. 2—Rules under Act, Rr. 23 and 29—*M*, tenant of accused, being recruited in army—Accused suing *M* for arrears of rent—*M* appearing before District Magistrate and making statement which was neither on oath nor signed—District Magistrate charging accused with having contravened R. 23 and convicting him—Procedure followed is irregular—As alleged charges occurred after *M* had joined army R. 23 did not apply 17

—Ss. 195 and 476—Provisions of S. 476 are complete—Offence of kind referred to in S. 195 either committed before Court or brought to its notice—S. 476 applies 382(2)

—S. 195—Superior Court—Munsif is subordinate to Subordinate Judge within S. 195 332a

—S. 195—Offence under Penal Code, S. 471, committed before Collector in appeal—District Magistrate has no jurisdiction to take cognizance of offence—Penal Code (1860), S. 471 329

—Ss. 195 and 487—Disobedience to lawful summons—Conviction by Magistrate whose order disobeyed is illegal and must be set aside—Penal Code (45 of 1860), S. 174 320(1)

—S. 195—Accused charging *B* under Penal Code, S. 406—Complaint dismissed—*B* applying for sanction to prosecute for perjury—Application dismissed—Accused bringing civil suit against *B*—While suit was pending *B* appealing to District Magistrate against order refusing sanction—District Magistrate dismissing appeal temporarily till civil suit was decided and after its decision granting sanction—Order is illegal for there is no such thing as temporary dismissal of appeal 247

—S. 195—Sanction granted is given by Court which first grants it and not by Court which subsequently refuses to revoke it 243

—Ss. 195 and 476—Words "referred to in S. 195" are descriptive of offences mentioned in S. 195—S. 195 does not control S. 476 129a

—Ss. 195, 439 and 476—Sanction for prosecution for perjury granted by civil Court—High Court has no power to set it aside either under S. 439 or under Civil Procedure Code (1908), S. 115 68

—S. 195—Sanction for prosecution—

Criminal P. C.

Petty theft committed 38 years previously, denial of—Sanction should not be granted 67(1)

—Ss. 195 and 476—Perjury committed in summary trial—Court must take action itself 67(2)

—S. 195 (6)—Superior Court can take additional evidence 332b

—S. 196-A—Words "not punishable with death, transportation or rigorous imprisonment for two years or upwards" do not apply to non-cognizable offence—District Magistrate empowered under S. 196-A can sanction prosecution of non-cognizable offence without regard to amount of punishment 345a

—Ss. 200 and 191—Defence of India Act (1915), S. 2—Rules under Act, Rr. 23 and 29—*M*, tenant of accused, being recruited in army—Accused suing *M* for arrears of rent—*M* appearing before District Magistrate and making statement which was neither on oath nor signed—District Magistrate charging accused with having contravened R. 23 and convicting him—Procedure followed is irregular—As alleged charges occurred after *M* had joined army, R. 23 did not apply 17

—S. 203—Application to set aside order of dismissal under S. 203—Notice to accused is not necessary 258(2)

—S. 209—Magistrate is not authorized to write judgment, but to record reasons for order of discharge 126(1)b

—S. 215—Commitment to Sessions can be quashed only on ground of illegality 296(1)

—Ss. 234 and 537—Forest Act (1878), S. 25 (f)—Person felling trees is guilty of as many offences as number of trees felled—Accused charged for felling 69 trees convicted on only three separate charges—Trial is bad in law—Accused being sufficiently punished irregularity held to be covered by S. 537 351a

—S. 234—Accused committing numerous offences of same kind—Small number of typical cases should be selected and charge framed accordingly—If sentence passed is sufficient remaining charges need not be proceeded with—If accused is acquitted of charges, prosecution can proceed with remaining charges 351b

—S. 236—Doubt as to what offence committed—Charge should be clearly formulated 322b

—Ss. 250, 209 and 253—Offence triable by Court of Session—Inquiry by

Criminal P. C.

Magistrate under Ch. 18—Discharge of accused under S. 209—Compensation cannot be awarded to accused 126(1)a
 *—S. 250—Information of offence charging certain person given to another—Other lodging complaint—First informer is person within S. 250 on whose information accusation is made 111(1)
 *—S. 250—S. 250 speaks of whole case and contemplates trial or inquiry ending in unqualified acquittal—Where accused is charged under different sections and is acquitted under one, but convicted under others S. 250 does not apply 109(1)
 —Ss. 289 and 537—Failure to call accused to enter defence is irregularity curable under S. 537 if no prejudice is caused 298
 —S. 342—Person accused with another in inquiry resulting in discharge—He can be competent witness in further inquiry 111(2)b
 —Ss. 350 and 537—S. 350 covers cases of transfers as well as those in which Court remains same, but person of presiding officer is changed—Judgment pronounced on evidence of another Magistrate—Irregularity is cured by S. 537 in absence of failure of justice 279
 —Ss. 350, 15 and 16—Rules framed by U. P. Government under S. 16 held to be intra vires—Trial before Bench of Magistrates—Judgment by Bench other than Bench hearing evidence is illegal 56
 *—S. 397—Order that sentences passed on accused in two trials held on same day should run concurrently is not illegal 303(1)
 —Ss. 417 and 439—Revision against acquittal by private person—No appeal by Local Government—High Court is loth to interfere 174a
 —S. 423—Penal Code (1860), Ss. 147 and 325—Conviction under both sections—Appellate Court disbelieving whole evidence cannot confirm conviction under one section and set aside that under other 355(1)
 —Ss. 423 and 439—Trial of two accused for kidnapping—On appeal by one conviction set aside and commitment to Sessions ordered—Case of other referred to High Court—Pending reference order of commitment passed against both accused—Order held to be illegal 228(2)
 —Ss. 423 and 439—High Court cannot in revision convict person whose trial ended in complete acquittal—Appeal how-
 1918 Indexes (All.)—3 & 4

Criminal P. C.

ever opens out entire case and empowers High Court to record conviction 65b
 —S. 423, Cl. (b)—Necessary evidence not brought upon record by lower Court—Nothing more should be done than to have the evidence taken and brought on record 133
 —S. 435—Evidence same against absconding accused—Others acquitted—Order to continue proceedings against absconders held improper and High Court can interfere under S. 435 106
 —S. 435—Complaint of theft against brother compromised—Action taken under S. 182, I. P. C., is not proper—Penal Code (1860), S. 182 100(1)
 —S. 437—Charge framed in warrant case—Accused pleading not guilty—Magistrate writing judgment "discharging" accused—Accused must be deemed to have been acquitted—Further inquiry under S. 437 is not competent 335
 —S. 437—Accused discharged—Order of further inquiry without notice is not illegal—But in judicial discretion it is advisable to give previous notice 111(2)a
 —S. 438—Acquittal—No appeal by Government but revision filed by complainant—Reference by Sessions Judge for re-trial to High Court—Re-opening held inadvisable due to long lapse of time 233
 —Ss. 439 and 423—Trial of two accused for kidnapping—On appeal by one conviction set aside and commitment to Sessions ordered—Case of other referred to High Court—Pending reference order of commitment passed against both accused—Order held to be illegal 228(2)
 —Ss. 439 and 417—Revision against acquittal by private person—No appeal by Local Government—High Court is loth to interfere 174a
 —Ss. 439, 476 and 195—Sanction for prosecution for perjury granted by civil Court—High Court has no power to set it aside either under S. 439 or under Civil Procedure Code (1908), S. 115 68
 —Ss. 439 and 423—High Court cannot in revision convict person whose trial ended in complete acquittal—Appeal however opens out entire case and empowers High Court to record conviction 65b
 —Ss. 476 and 478—Munsif taking action under S. 476 and after giving notice and receiving written statements deciding to commit accused under S. 478—On day

Criminal P. C.

fixed for inquiry Munsif framing charge after recording brief statements and committing accused—Procedure is illegal 415(2)b

—Ss. 476 and 195—Provisions of S. 476 are complete—Offence of kind referred to in S. 195 either committed before Court or brought to its notice—S. 476 applies 382(2)

—Ss. 476 and 195—Words 'referred to in S. 195' are descriptive of offences mentioned in S. 195—S. 195 does not control S. 476 129a

—S. 476—S. 476 applies to both offence committed before Court or brought to its notice 129b

—Ss. 476 and 478—Munsif at Agra can take action under S. 476 in respect of offences under Ss. 476, 471, 193, 209 and 210, I. P. C. committed in Bengal but brought to his notice 129c

—Ss. 476, 195 and 439—Sanction for prosecution for perjury granted by civil Court—High Court has no power to set it aside either under S. 439 or under Civil Procedure Code (1908), S. 115 68

—Ss. 476 and 195—Perjury committed in summary trial—Court must take action itself 67(2)

*—S. 477—S. 477 does not lay down that trial under it should be summary one—At conclusion of trial Sessions Court charging defence witness with perjury—Court refusing to grant time to accused and sentencing him there and then—Case should be retried as trial was irregular 1

—Ss. 478 and 476—Civil Court making inquiry under S. 478 should proceed as Magistrate proceeds in inquiry into case before commitment 415(2)a

—Ss. 487 and 195—Disobedience to lawful summons—Conviction by Magistrate whose order was disobeyed is illegal and must be set aside 320(1)

—S. 512—Evidence taken against absconding persons—Evidence showing that there was no immediate prospect of their arrest—Magistrate stating that evidence was taken under S. 512—Presumption is that Magistrate did his duty and that evidence was not recorded unlawfully, although he did not recite finding that there was no immediate prospect of arrest 60

—Ss. 514 and 118—Surety offering house property as security can be accepted 182

Criminal P. C.

—S. 522—Order for possession refused on ground of delay but passed by District Magistrate in appeal held proper 407

—S. 526—Charge under Penal Code, Ss. 211 (2)—Honorary Magistrate having no experience of criminal trial is not proper tribunal—Unnecessary adjournments by Magistrate are sufficient for transfer of case 372

—S. 526 (e)—Fact that one Magistrate of Bench is friend of accused is no sufficient ground for transfer 391 (1)

—Ss. 537 and 234—Forest Act (1878), S. 25 (f)—Person felling trees is guilty of as many offences as number of trees felled—Accused charged for felling 69 trees convicted on only three separate charges—Trial is bad in law—Accused being sufficiently punished irregularity held to be covered by S. 537 351a

—Ss. 537 and 289—Failure to call accused to enter defence is irregularity curable under S. 537 if no prejudice is caused 298

—Ss. 537 and 350—S. 350 covers cases of transfers as well as those in which Court remains same, but person of presiding officer is changed—Judgment pronounced on evidence of another Magistrate—Irregularity is cured by S. 537 in absence of failure of justice 279

Criminal Trial

—Evidence—Penal Code (1860), Ss. 147 and 325—Conviction under both sections—Appellate Court disbelieving whole evidence cannot confirm conviction under one section and set aside that under another 355 (1)

—Defence—Person accused of culpable homicide—He can set up 'alternative defence, namely that he was not present at occurrence and if he failed to satisfy Court of this fact he could show that he was acting in private defence—Evidence Act (1872), S. 105 189c

—Defence should not be called upon to frame a theory 160c

Criminal Tribes Act (3 of 1911)

—S. 22 (2) (a)—Local Government Rules, R. 8 (a)—'Change of residence' illustrated—Neglect to notify absence from residence is offence 387

—S. 23—Penal Code (1860), Ss. 457 and 380—Accused member of criminal tribe walking into house and stealing articles—Accused caught before getting away is not guilty under S. 457 as to be

Criminal Tribes Act
 liable to enhanced punishment under
 U. P. Criminal Tribes Act 130
Deed
 —Construction—Sale or lease — Facts
 to be considered stated 263b
Defence of India Act (4 of 1915)
 —S. 2—Rules under Act, Rr. 23 and
 29—*M*, tenant of accused, being recruited
 in army—Accused suing *M* for arrears of
 rent—*M* appearing before District Magis-
 trate and making statement which was
 neither on oath nor signed —District
 Magistrate charging accused with having
 contravened R. 23 and convicting him—
 Procedure followed is irregular — As al-
 leged charges occurred after *M* had joined
 army R. 23 did not apply—Criminal
 P. C. (1898), Ss. 191 and 200 17
Eascheat
 —Wajibularz—Entry in— Value of—
 Resident in village dying without heirs—
 Zamindar and not Crown held entitled
 to site and house by grant 154
Evidence Act (1 of 1872)
 —S. 25—No evidence of offence except
 confession—Confession must be taken as
 a whole 160b
 —Ss. 27 and 28—Statement made to
 police leading to discovery of fact de-
 posed, proved by deposition of officer
 taking down statement— Defence is en-
 titled to require production and proof of
 record made at police station 160a
 *—S. 68 — Mortgage deed entering
 wrong rate of interest—Second deed exe-
 cuted incorporating some clauses of first
 deed—Suit on mortgage—One of attesting
 witnesses of first deed dead— Second
 called but not examined—First deed could
 not be used in evidence—But as part of
 second deed it was admissible 201a
 —S. 68—"Called" means tendered for
 giving evidence 201b
 —S. 105—Criminal trial— Defence—
 Person accused of culpable homicide—
 He can set up alternative defence,
 namely, that he was not present at occur-
 ence and if he failed to satisfy Court of
 this fact he could show that he was act-
 ing in private defence 189c
 —S. 115—Principle does not apply to
 criminal law 168g
 —S. 126— Communication made to a
 wakil in course of employment, whether
 by word of mouth or by demonstration,
 is inadmissible in evidence 38
 —S. 132—Protection afforded by S. 132
 must be claimed by witness before he

Evidence Act
 makes statement in respect of which
 question is subsequently raised 260b
Execution
 —Decree—Interest ceases from date of
 deposit of portion—Interest 234
 —Decree binding—Court executing de-
 cree is bound to give effect to it as it
 stands 96b
Execution Sale
 —Rights of purchaser — Property
 transferred by auction-purchaser—Trans-
 feree deprived of possession— Refund of
 price by auction-purchaser—Suit by auc-
 tion-purchaser to recover purchase-money
 from decree-holder is not maintainable
 325
Forest Act (7 of 1878)
 —S. 25 (f) — Person felling trees is
 guilty of as many offences as number of
 trees felled—Accused charged for felling
 69 trees convicted on only three separate
 charges—Trial is bad in law — Accused
 being sufficiently punished irregularity
 held to be covered by S. 537, Criminal
 P. C. (1898), Ss. 234 and 537 351a
 —S. 25 (i)—Accused with two others
 going into reserved forest for hunting—
 Other two shooting deer—All are guilty
 under S. 25 (i) 338
Government of India Act (1915)
 —S. 107—S. 107 cannot be invoked to
 question proceedings lawfully taken
 under Ch. 12, Criminal P. C. 186(2)a
Grant
 —Construction — "Malik" indicates
 absolute estate 255a
General Clauses Act (10 of 1897)
 —S. 10 — Pre-emption — Money not
 paid within time prescribed—Court has
 no power to extend time 13
Guardians and Wards Act (8 of 1890)
 —S. 31—Sale of minor's property with
 sanction of Court — Re-sale cannot be
 ordered — Duty of District Judge laid
 down 94a
 —S. 47—Appeal—Whether lies from
 order of District Judge ordering resale
 of a property of minor which has already
 been sold under his order—*Quaere* 94b
Hindu Law
 —Adoption—Widow—Widow allowed
 to remain in possession of estate till
 death—Vested right is created in favour
 of son—Transfer of such vested right is
 unaffected by Transfer of Property Act
 (1882), S. 6 (a) 115
 —Alienation—Father — Alienation for
 antecedent debt binds son 377a

Hindu Law

- Alienation—Father leper can alienate so as to bind son provided alienation is for legal necessity 377b
- Alienation—Widow—Gift to daughter and daughter's son—Suit for declaration by reversioners that gift is invalid—Decree, form of, stated 369(2)
- Alienation—Widow—Deceased's relative undertaking to pay off his debts but not paying it off—Alienation by widow to pay off that debt—Failure to pay by relative does not form good consideration 342(2)
- Alienation—Coparcener acting on behalf of family—Alienation can be impeached by other members not parties to it as being made without authority—Alienation is good as against stranger 309a
- Alienation—Widow—Gift for religious purpose calculated to confer benefit upon deceased husband need not be in connexion with particular shradh ceremony 40a
- Alienation—Widow—Gift of reasonable portion of husband's property for charitable purpose and welfare of deceased husband is valid whether made through son or not 40b
- Alienation—Widow—It is incumbent upon Hindu widow to perform certain indispensable ceremonies for spiritual welfare of late husband—If property is alienated for such purpose proportion of property alienated with whole property is not material—Only thing to be considered is whether alienation was reasonable 40c
- Debt—Coparcener—Debt not for family necessity—Decree should be against self-acquired property in hands of heirs 391(2)
- Debts—Coparcener—Antecedent debt incurred by brother in position of manager is not binding on coparceners unless incurred for family necessity 250b
- Gift to female—Donee described as "malik" mustaqail—Donee held took absolute estate 255b
- Maintenance—Widow—Extent of right—Widow's right to residence and maintenance is in reference to property existing at time of her husband's death 408
- Partition—Reopening—There is mutual right of indemnity in respect of paramount claim by third person throwing burden of loss unfairly upon one

Hindu Law

- party—Discovery of mistake—Partition can be reopened to apportion loss 223
- Religious endowment—Grant of property in favour of Mahant and his heirs for services rendered to temple is not grant to idol or temple 309b
- Reversioner—Widow—Gift by—Suit by reversioner, with possibility of succeeding to estate, for declaration that gift shall not affect his rights is not maintainable—Nearest reversioner minor—Distant reversionary heir is not entitled to sue 393
- Succession—No Act interfering—Succession to Hindus is governed by Hindu law 384(2)b
- Succession—Widow—Widow living peacefully with husband till his death obtaining possession of estate—Adulterous act committed many years prior to her husband's death cannot divest her of estate 359
- Widow—Possession by trespasser during lifetime of widow is not adverse against reversioners 15
- Husband and Wife**
 - Restitution of conjugal rights—Parties found on bad terms—Husband suspecting wife's fidelity and bringing civil and criminal cases against her—Plaintiff is not entitled to decree 235
- Interest**
 - Execution—Decree—Interest ceases from date of deposit of portion 234
- Interpretation of Statutes**
 - Headings—Agra Tenancy Act (1901), Ss. 156 and 158—Suit for assessment of rent does not fall outside scope of S. 156 264
 - Extension of words—It is not competent to Court to extend words of enactment by construction 168b
 - Application by Courts—Plea that criminal enactment can be interpreted as amending civil law by implication cannot be supported (FB) 69c
 - Application by Courts—Civil and Criminal law and procedure are independent of each other (FB) 69d
- Jurisdiction**
 - Waiver—High Court has power of interference 355(2)b
 - Civil and Revenue—Parties admitting existence of plot of land under occupancy rights—Each party claiming to be entitled to holding—Suit is cognizable by civil Court 317a
 - Civil and Revenue—Revenue Court having exclusive jurisdiction—Its finding

Jurisdiction

cannot be questioned in civil Court 49(2)a

Land Acquisition Act (1 of 1894)

—Ss. 23 and 49 — Compound appurtenant to house under cultivation of occupancy tenants acquired—Compensation assessed on basis of 16 years purchase of annual profits—Method of assessment is correct 126(2)

—Ss. 49 and 23 — Compound appurtenant to house under cultivation of occupancy tenants acquired—Compensation assessed on basis of 16 years purchase of annual profits—Method of assessment is correct 126(2)

Legal Practitioner

—Breach of professional etiquette while conducting case — Matter calling for disciplinary powers — Court should first decide merits of case reserving such question for further consideration after disposal of case 275b

Legal Practitioners Act (18 of 1879)

—S. 13 — Professional misconduct — Pleader intimidating witness to prevent him from giving evidence is guilty — Letters Patent (Allahabad), Cl. 8 (SB) 136

—S. 36—Evidence that may be legitimately tendered under S. 36 is of general repute and it includes hearsay evidence 271a

—S. 36—Principles applicable to cases under S. 110, Criminal P. C., apply to cases under S. 36—Criminal P. C. (1898), S. 110 271b

—S. 36 (3)—Mere removal of list exhibited in District Court does not amount to cancellation of original order 271c
Letters Patent (Allahabad)

—Cl. 8—Legal Practitioners Act (18 of 1879), S. 13—Professional misconduct — Pleader intimidating witness to prevent him from giving evidence is guilty (SB) 136

—Cl. 10 — Decree under— Review is not permissible 221(1)
Limitation Act (9 of 1908)

—S. 4—Pre-emption—Money not paid within time prescribed — Court has no power to extend time 13

—S. 6 — S. 6 does not apply to application to make mortgage decree final 76b

—S. 12—Allahabad High Court Rules, Ch. 3, R. 2—Scope—It does not affect or alter S. 12, Limitation Act — Time required to obtain copy of judgment cannot be excluded (FB) 389b

Limitation Act

—S. 14— Suit brought in Small Cause Court — Court directing plaint to be returned for presentation to proper Court—Plaintiff refusing to take back plaint and lodging revision— Revision dismissed — Three months after dismissal of revision plaintiff asking for return of plaint — Period of three months cannot be excluded as there was no due diligence on plaintiff's part — Plaintiff was not justified in refusing to take back plaint merely because he wished to file revision 180

*—S. 15—Granting time to judgment-debtor is not order staying execution 216(2)c

—S. 15—"Prescribed" refers to periods prescribed by that Act and does not apply to Civil P. C. (1908), S. 48 216(2)d

—S. 18 and Art. 166 — S. 18 applies only where person having right to make application has been by fraud kept from knowledge of his right — Civil P. C. (1908), O. 21, R. 89 336

—S. 20 — Mortgage — Payment of interest saves limitation also against subsequent purchaser of equity of redemption or subsequent mortgagee of portion of property 61

—S. 23—Suit for declaration—Each invasion of right to take fallen wood gives rise to fresh cause of action and suit for declaration can be brought within six years of each invasion 102 (2)

—Art. 2—Execution of decree—Court officer improperly holding sale—Suit for damages is governed by Art. 2 63

—Art. 11—Civil P. C. (1908); O. 21, R. 58—Objection dismissed without investigation — Case is taken out of one year's rule of limitation—Claim under O. 21, R. 58—Other party disputing claim—No evidence produced by claimant—Objection dismissed—Dismissal cannot be said to be without investigation 72

—Art. 75—Instalment bond—Creditor having option to recover whole sum in lump on default of any instalment—Option not exercised—Suit for last three instalments is not barred 55

—Arts. 80 and 120—Cattle hypothecated as security for loan—Suit for enforcement of lien — No personal relief claimed—Art. 120 applies 344

—Art. 116 — Sale-deed containing covenant of indemnity—Breach of covenant—Suit for damages—Time begins to run when actual loss is suffered 219

Limitation Act

—*Arts. 120 and 80* — Cattle hypothecated as security for loan — Suit for enforcement of lien — No personal relief claimed—Art. 120 applies 344

—*Art. 120*—Person in possession gets fresh cause of action on every repetition of denial of title—His forbearance on some occasion does not bar his right 175b

—*Art. 134* — Mortgage of occupancy holding to zamindar—Transfer of holding by zamindar—Suit for redemption—Limitation of 12 years applied from date of transfer 352

—*Art. 148* — Suit for redemption by purchaser of portion of equity of redemption against purchaser of another portion who has redeemed whole property, is governed by Art. 148—Co-mortgagor explained 386

—*Art. 166 and S. 18*—S. 18 applies only where person having right to make application has been by fraud kept from knowledge of his right—Civil P. C. (1908), O. 21, R. 89 336

—*Arts. 181 and 182*—Decree for costs — Decree satisfied by attachment and execution of decree in favour of judgment-debtor—Decree attached set aside on appeal—Refund by decree-holder of amount realized—Fresh application for execution is governed by Art. 182 and not by Art. 181 401 (2)

—*Art. 181*—Art. 181 governs application for final decree—Limitation runs from expiry of period fixed by preliminary decree for payment—Civil P. C. (1908), O. 34, R. 5 285c

—*Art. 181*—Civil P. C. (1908), O. 34, R. 6—Application under O. 34, R. 6, is application in original suit for new decree and cannot be regarded as application for execution—Application is governed by Limitation Act 105

—*Art. 181* — Mortgage preliminary decree appealed against—Appellate decree is to be made final—Time is to be counted from that decree 76a

—*Arts. 182 and 181*—Decree for costs — Decree satisfied by attachment and execution of decree in favour of judgment-debtor—Decree attached set aside on appeal —Refund by decree-holder of amount realized—Fresh application for execution is governed by Art. 182 and not by Art. 181 401 (2)

—*Art. 182* — Decree against several defendants — Appeal by two dismissed with costs—Application for execution of

Limitation Act

appellate decree for costs was held barred by limitation 330

—*Art. 182*—Application for final decree

—Minor defendant not properly described

—Defect does not prevent saving limitation 289

—*Art. 182* — Decree directing ascertainment of mesne profits — Limitation for execution begins from date of ascertainment 254

—*Art. 182*—Civil P. C. (1908), O. 21, R. 11 (2)—Application fulfilling requirements of R. 11—Application is good if copy of decree is subsequently filed and saves limitation 242

—*Art. 182 (5)*—Application to reject objections against execution is step-in-aid 92

**—*Art. 182 (6)*—"Date of issue of notice" is date of order directing issue of notice (FB) 183 (2)

Mahomedan Law

—Pre-emption — More than two co-sharers—Right to pre-empt does not exist

—Custom—Entry in Wajibularz held too vague 376

—Pre-emption—Parties to sale cannot defeat right of pre-emption by dressing sale in garb of lease 263a

—Wakf—Creation of—Trust-deed not divesting settlor of ownership does not constitute wakf 21 (1)

Malicious Prosecution

—Damages — Charge false to defendant's knowledge—Malice can be inferred from conduct 396

Mortgage

—Suit on—Successful plaintiff ordinarily gets costs against mortgaged property and not personally against defendant—Civil P. C., O. 34, Rr. 4, 5 and 10 366a

—Construction — Usufructuary mortgage of zamindari — Mortgagee giving lease for term of mortgage of same—Suit for arrears of rent by mortgagee—Equity of redemption sold in execution of decree —Subsequent suit for arrears of rent—mortgagor is liable to pay rent as long as mortgage lasted whether or not he became exproprietary tenant of zamindari —Agra Tenancy Act (1901), S. 10—U. P. Land Revenue Act (1901), S. 36 268

Mortgagor and Mortgagee

—Zamindar mortgaging sixteen annas interest in mahal without reservation—Mortgage includes grove holder's interest acquired by zamindar 49(1)

Motor Vehicles Act (8 of 1914)

—S. 11 — U. P. Government Rules
R. 12, Cl. (1)—Lamp on each side of front
portion of vehicle is required 258(1)a

—S. 11 — U. P. Government Rules,
R. 12, Cl. 1—"Front portion" of vehicle
—Meaning of, explained 258(1)b

Mussalman Wakf Validating Act (6 of 1913)

—Act is not retrospective 2a

Negotiable Instruments Act (26 of 1881)

—Ss. 64 and 76—Bill of exchange—
Payee endorsing to plaintiff—Plaintiff
suing drawer and drawee without pre-
senting bill to drawee either for accept-
ance or payment—Drawer found to have
drawn bill against goods supplied to
drawee—Neither drawer nor drawee held
liable on bill 20

Partition Act (4 of 1893)

—Ss. 2 and 3—Civil P. C. (1908),
O. 23, R. 1—Suit for partition—Plain-
tiff asking house to be sold—Defendant
offering to purchase—Price fixed—Appli-
cation for withdrawal of suit held rightly
dismissed as too late 356

Patent and Designs Act (2 of 1911)

**—S. 3—Patent Invention, what is
—Combination of old materials in new
form can be patented 24

Penal Code (45 of 1860)

—S. 22 — Letter thrown away by
owner and picked up and carried away
by another whether "property"—*Quaere*
353b

—Ss. 97, 324 and 334—Accused set
upon and assaulted by complainant—
Struggle ensuing — Accused wounding
complainant with sharp weapon is guilty
under S. 334 189a

—S. 97—Limitation of right of private
defence can only be by provisions of sta-
tute law 189b

—Ss. 111, 114 and 302—Conspiracy
to obtain girl by show of force—On refu-
sal one accused shooting—Death caused
—Others are not guilty of abetment as
causing death was no part of conspiracy
97(2)

—Ss. 147 and 325—Conviction under
both sections — Appellate Court dis-
believing whole evidence cannot confirm
conviction under one section and set
aside that under other—Criminal trial,
Evidence—Criminal P. C., S. 423. 355(1)

—Ss. 172 and 406—Property attached
in execution of decree kept in custody of
accused — Accused not producing pro-
perty on demand—Accused held guilty
under S. 172 and not under S. 406 406(1)

Penal Code

—S. 173—Service—Tender of summons
is sufficient—Refusal to receive summons
is no offence 409

—S. 174 — Criminal P. C. (1898),
Ss. 195 and 487—Disobedience to lawful
summons — Conviction by Magistrate
whose order was disobeyed is illegal and
must be set aside 320(1)

—S. 182 — Peon of Court of Wards
submitting petition of resignation con-
taining distorted version of his quarrel
with co-servant—Petition is not com-
plaint and peon was not guilty under
S. 182 265

—S. 182 — Criminal P. C. (1898),
S. 435 — Complaint of theft against
brother compromised — Action taken
under S. 182, I. P. C., is not proper
100(1)

—S. 182—Applicability—Petition to
District Magistrate to unlock house—
Police reporting that allegations were
false—S. 182 does not apply and prose-
cution under that section cannot be sanc-
tioned 85(1)

*—S. 192—Antedating receipt of sale
when sale in fact took place on previous
date is no offence 326

—S. 223—Policeman held not guilty
of negligently suffering prisoner to escape
282

—S. 266—Fraudulent intent is essen-
tial—Where both parties know falsity of
measure no fraudulent intent exists 174b

—S. 289 — Ferocious animal letting
loose is offence but in case of dog it must
be proved that it had biting tendency—
Tort, Damages 369(1)

—S. 300, *Excep. 4* and S. 304—Lathis
being lethal weapons, accused using them
must be held to have knowledge that
they were likely to cause death—Offence
held to fall under *Excep. 4* to S. 300
420

—S. 302—Death caused by arsenic—
Offence is murder 283

—Ss. 302, 111 and 114—Conspiracy to
obtain girl by show of force—On refusal
one accused shooting — Death caused —
Others are not guilty of abetment as
causing death was no part of conspiracy
97(2)

—S. 302—Several persons attacking by
lathis and causing death—All are guilty
of murder 65a

—Ss. 304 and 300, *Excep. 4* — Lathis
being lethal weapons, accused using them
must be held to have knowledge that

Penal Code

they were likely to cause death—Offence held to fall under Excep. 4 to S. 300

420

—Ss. 304 and 325—Murder not common intention — Doubt as to who dealt fatal blow — Accused punishable under S. 325 and not S. 304

209(1)

—S. 304-A—Railways Act (9 of 1890), S. 101—Rash and negligent act causing death—Station Master giving "line clear" knowing another train standing in the way, is guilty under both the sections when death ensues

429(2)

—Ss. 325 and 304 — Murder not common intention — Doubt as to who dealt fatal blow — Accused punishable under S. 325 and not S. 304

209(1)

—S. 332 — "In discharge of duty as such public servant" means in discharge of duty imposed by law in particular case — Constable purporting to act under order of Magistrate no longer in force asking accused to give up lathis—Accused refusing and assaulting cannot be convicted under S. 332

238(2)

—Ss. 334, 324 and 97 — Accused set upon and assaulted by complainant — Struggle ensuing — Accused wounding complainant with sharp weapon is guilty under S. 334

189a

—S. 366 — Girl under 16 taking food to bullocks at father's bidding persuaded by accused to accompany him—Accused dressing her up as boy and living with her for some time — Accused is guilty under S. 366

134

—Ss. 399 and 402 — Preparation — Members of gang agreeing to meet at rendezvous with arms—Accused arriving unarmed with others at rendezvous — There is preparation to commit dacoity — At least offence under S. 402 is proved

361

—Ss. 402 and 399 — Preparation — Members of gang agreeing to meet at rendezvous with arms—Accused arriving unarmed with others at rendezvous — There is preparation to commit dacoity — At least offence under S. 402 is proved

361

—S. 403—Letter read thrown by complainant — Accused picking it up and attaching it to affidavit in a case of judicial separation between him and his wife—Accused is not guilty of misappropriation

353a

—Ss. 406 and 172—Property attached in execution of decree kept in custody of

Penal Code

accused—Accused not producing property on demand—Accused held guilty under S. 172 and not under S. 406

406(1)

—S. 408—Accused engaged by station master to mark goods, recovering money as overcharge and converting it to his own use—Accused not being servant of Railway Company cannot be convicted under S. 408

399

—S. 420—Prosecution must show that accused deceived complainant

403(1)

—S. 441—Entry by agent under orders is sufficient

378a

—S. 441—Trespass by agent—Person getting people to build on another's land is guilty

378b

—Ss. 441 and 447 — Criminal trespass — Absence of criminal intent — Offence cannot be said to be committed

365

—Ss. 441 and 509—Stranger lurking in house of another at night — Prosecution can ask Court to infer that there was guilty intention sufficient to bring action within S. 441

299a

*—S. 441—House trespass — Accused alleging that he went to carry on intrigue with woman in house — Complicity by woman—Intention to preserve secrecy—It is difficult to say that there was any intention to annoy third person unless that person had expressly prohibited accused

299b

—S. 448 — Decree-holder attaching cattle of judgment-debtor in third person's house under process in execution does not commit any offence

374(2)

—Ss. 457 and 380 —Accused member of criminal tribe walking into house and stealing articles—Accused caught before getting away is not guilty under S. 457 as to be liable to enhanced punishment under U. P. Criminal Tribes Act (1911), S. 23

130

—S. 471—Criminal P.C. (1898), S. 195 — Offence under Penal Code, S. 471 committed before Collector in appeal — District Magistrate has no jurisdiction to take cognizance of offence

329

—S. 482 — Fraudulent intention is ingredient of offence—In its absence conviction is improper

109(2)

—S. 499, Excep. 1 — Statement to come under exception must be true in fact

260a

—S. 500—Using obscene and insulting language is offence under S. 500

125a

Penal Code

—S. 500 — Utterance of prima facie defamatory words used in street quarrel does not necessarily suggest intention to harm reputation (*Obiter*) 125b

Practice

—Appeal — Evidence not commented upon does not prove that it was ignored 244a

—Appeal — High Court cannot allow appeals put forward as revision 192c

—Jurisdiction—Particular Court given jurisdiction to act—That Court should be appealed to and not High Court 343b

Precedent

—Subordinate Courts must follow rulings of their High Court 417b

—Value of—Amendment of statute not expressly altering interpretation by previous decisions—They are to be adhered to 412b

Pre-emption

—Custom—Plaintiff within custom at time of sale by imperfect partition—Plaintiff is entitled to priority to pre-empt 429(1)

—Acquiescence, what amounts to, illustrated — Plaintiff willing to sell his own share amounts to acquiescence 428

—Suit for — Re-sale to vendor after institution of suit—Vendor ceasing to be cosharer—Plaintiff was entitled to pre-empt 401(1)

—Price — Consideration in sale deed should be taken as true—Price excessive —Burden of proof is shifted—Property worth amount stated in sale deed — Details of consideration need not be proved 381(2)

—Mahomedan Law — More than two co-sharers—Right to pre-empt does not exist—Custom—Entry in *Wajibularz* held too vague 376

—Price — Payment of—Prompt payment of purchase-money is presumed—Time for payment can be extended for sufficient reasons—Special term in decree should be embodied 374(1)

—*Wajibularz*—Entry in—Sale to relation—Nearer relation held had right to pre-empt 373

—Pre-emptor present at sale—Refusal to bid amounts to refusal to purchase—Suit for pre-emption is not maintainable 323

—Custom — Entry in *Wajibularz* — Construction — Mortgage by conditional sale—Foreclosure is not sale—Pre-emp-

Pre-emption

tor's right to step into shoes of mortgagee held barred 286

—Suit for—Vendee becoming cosharer by purchase before institution of suit—Second sale not pre-empted—Suit to pre-empt prior sale should be dismissed 259

—Custom—Entry in *Wajibularz* relied on as proof should be considered 227

—Custom — Right to pre-empt by cosharer—Refusal to purchase by cosharer — Vendor is entitled to sell to stranger and need not offer to cosharer second time 188

—Money not paid within time prescribed—Court has no power to extend time—Limitation Act (1908), S. 4—General Clauses Act (1897), S. 10 13

Provincial Insolvency Act (3 of 1907)

—Ss. 6 (3), 15 and 16 (1) — Debtor's petition for adjudication—Court is bound to make inquiry before passing order 308

—S. 15 — Court can refuse order of adjudication only in cases prescribed by the Act 368

—S. 16 — Attachment of property of judgment-debtor ceases to have any effect after his adjudication as insolvent—Creditor cannot continue execution proceedings 402

—S. 16 (2)—Income of insolvent can be appropriated for benefit of creditors—That amount must not be arbitrarily fixed 248

—S. 20 — Civil P. C. (1908), O. 33, R. 8—Person obtaining leave to sue in forma pauperis adjudicated insolvent—Receiver can continue suit 177(1)

—S. 22—On dismissal of objection, suit under O. 21, R. 63, making receiver party to such suit—S. 22 does not apply —Suit is not barred 363(1)

—Ss. 22 and 46—Property of stranger seized by receiver in bankruptcy—His remedy is not confined to S. 22—He can file suit in civil Court in ordinary manner for return of property 346a

—S. 22—Application under S. 22 is suit within meaning of Civil P. C. (1908), S. 11 346b

—S. 34—Attachment of debtor's decree ceases after adjudication—Official Receiver can alone execute decree 324(1)

—S. 42—Suit instituted by receiver is maintainable after annulment of adjudication 21(2)

—Ss. 46 and 22—Property of stranger seized by receiver in bankruptcy—His remedy is not confined to S. 22—He can

Provincial Insolvency Act

file suit in civil Courts in ordinary manner for return of property 346a

Provincial Small Cause Courts Act (9 of 1887)

—S. 25—Decision on question of jurisdiction—No revision lies 11

—S. 35—Civil P. C. (1908), S. 24 (4)

—Suit of small cause nature—Suit transferred from Sub-Judge with small cause powers to Munsif without such powers—Court as regards the suit is Court of Small Causes—Decision is not appealable 290(2)

—Art. 8—Suit against partner in tenancy for recovery of share of rent is cognizable by Court of Small Causes 210

—Art. 13—Suit by zamindar to recover price of oil due by oilman under terms of *Wajibularz*—Nature is of interest in immovable property—Jurisdiction of Small Cause Court is barred 79(1)

—Art. 31—Suit for share of rent realized by co-owner is suit for money had and received—Small Cause Court is competent to try 355(2)a

—Art. 31—Suit for mesne profits of grove wrongfully received by defendant is not cognizable 222

—Art. 41—Decree for maintenance against one of three brothers making him liable for whole amount—Payment by defendant made liable—Suit to enforce contribution held not excepted by Art. 41 167

—Art. 41—Debt paid off by one of several heirs of deceased Mahomedan—Suit to recover share from coheirs is cognizable by Court of Small Causes 9

—Sch. 2, Art. 38—Suit for annuity charged on property is not cognizable 398

Public Gambling Act (3 of 1867)

—Ss. 3 and 4 (as amended by Act 1 of 1917)—Keeping common gambling house—Prosecution must prove that instruments of gambling were used in the house for profit of accused 100(2)a

—Ss. 3 and 4 (as amended by Act 1 of 1917)—Particular house is common gambling house not established—Presence of accused in house raises no presumption 100(2)b

—S. 13—Order of confiscation of money found in possession of accused is illegal 390

Railways Act (9 of 1890)

—S. 101—Penal Code (45 of 1860), S. 304-A—Rash and negligent act caus-

Railways Act

ing death—Station master giving "line clear" knowing another train standing in the way is guilty under both the sections when death ensues 429(2)

Registration Act (16 of 1908)

—S. 17—Agreement by reversioners not to enforce right to declaration as to gift by widow is not compulsorily registrable 184

—Ss. 32, 33, 71, 73, 75 and 87—Mortgage-deed—Registration—Presentation by duly authorized agent—Mortgagor failing to appear, refusal by Registrar to register—Death of mortgagee—Widow applying for registration—Order by Registrar under S. 75 (1)—Collector as Manager, Court of Wards, subsequently sending document for registration with copy of order of Registrar—Document registered—Original presentation by agent is valid—Procedure adopted by Collector was sufficient compliance with requirements of S. 75 (2)—Irregularity if any was covered by S. 87 194(2)

—Ss. 75, 87, 32, 33, 71 and 73—Mortgage-deed—Registration—Presentation by only authorized agent—Mortgagor failing to appeal, refusal by Registrar to register—Death of mortgagee—Widow applying for registration—Order by Registrar under S. 75 (1)—Collector as Manager, Court of Wards, subsequently sending document for registration with copy of order of Registrar—Document registered—Original presentation by agent is valid—Procedure adopted by Collector was sufficient compliance with requirements of S. 75 (2)—Irregularity if any was covered by S. 87 194(2)

—Ss. 87, 32, 33, 71, 73 and 75—Mortgage-deed—Registration—Presentation by duly authorized agent—Mortgagor failing to appeal, refusal by Registrar to register—Death of mortgagee—Widow applying for registration—Order by Registrar under S. 75 (1)—Collector as Manager, Court of Wards, subsequently sending document for registration with copy of order of Registrar—Document registered—Original presentation by agent is valid—Procedure adopted by Collector was sufficient compliance with requirements of S. 75 (2)—Irregularity if any was covered by S. 87 194(2)

Specific Relief Act (1 of 1877)

*—S. 9—Suit based upon title wrongly dealt with as suit for possession under S. 9—Appeal lies against decision—

Specific Relief Act

Appellate Court should remand case for trial on merits 241

*—S. 9—Decree for possession of land and crops—Crops cut and removed by defendant before execution—Suit for value of crops is maintainable 12

—S. 42—Several persons claiming property as heirs on death of a person—Property in dispute in possession of tenant refusing to pay rent except to rightful owner—Each owner can sue for declaration of title without suing for possession 388

—S. 42—Denial of title must have been communicated to plaintiff to give cause of action—Limitation Act (1908), Art. 120 175a

Stamp Act (2 of 1899)

—Ss. 38, 40 and 57—Document, insufficiently stamped—Deficit duty levied by Collector—Reference to High Court is not competent (SB) 181(2)

—S. 62—Petition stating terms of compromise between parties and praying for decree does not require engrossed general stamp—Compromise 307

Succession Certificate Act (7 of 1889)

—S. 7—Hindu widow should not be ordinarily ordered to furnish security 406(2)

Suits Valuation Act (7 of 1887)

—Civil P. C. (1908), O. 21, R. 63—Suit under—Value of suit for jurisdiction is value of decree sought to be executed and not value of property attached 324(2)

Transfer of Property Act (4 of 1882)

—S. 6 (a)—Hindu Law—Adoption—Widow—Widow allowed to remain in possession of estate till death—Vested right is created in favour of son—Transfer of such vested right is unaffected by Transfer of Property Act 115

—S. 54—Right intended to pass by bargain—Non-payment of portion of consideration does not affect—Non-payment is sometimes strong evidence of non-enforceability of deed 337

—Ss. 54 and 118—S selling certain land to M by registered deed—M transferring on same day shop to S by registered deed—Subsequent agreement between S and M to re-transfer properties, thus each remaining in possession of what was originally transferred by deed—Subsequent transaction held binding on parties in spite of noncompliance with Ss. 54 and 118 211(2)b

—S. 54—S. 54 does not prohibit vest-

Transfer of Property Act

ing of title to property unless effected by formal transfer 211(2)c

—S. 59—Mortgage need not be in one document 201c

—S. 91—Usufructuary mortgage of sir plots—Proprietary rights sold in execution of decree—Purchaser also purchasing mortgagee's rights—Mortgagor as ex-proprietary tenant is entitled to redeem under S. 91—Agra Tenancy Act (2 of 1901), S. 10 392

—Ss. 118 and 54—S selling certain land to M by registered deed—M transferring on same day a shop to S by registered deed—Subsequent agreement between S and M to re-transfer properties, thus each remaining in possession of what was originally transferred by deed—Subsequent transaction held binding on parties in spite of non-compliance with Ss. 54 and 118 211(2)b

Treasure Trove Act (6 of 1878)

—Ss. 20 and 21—Forbidding person who is not finder to give required notice is no offence 322a

Tort

—Damages—Penal Code (1860), S. 289
—Ferocious animal letting loose is offence, but in case of dog it must be proved that it had biting tendency 369(1)

**—Defamation—Privilege—Words in complaint to criminal Court are absolutely privileged (FB) 69a

—Defamation—No Statute in India dealing with civil liability for defamation—Rules to be applied are rules of justice, equity and good conscience if found applicable to Indian society (FB) 69b

*—Defamation—Plea of truth is complete defence in civil action—It is not so in criminal trial (FB) 69c

U. P. Excise Act (4 of 1910)

—S. 44 (c)—Breach of condition of license by servant—Master cannot be convicted unless breach was with his knowledge 124

—Ss. 66 (a) and 71—Accused in possession of liquor—Presumption is not of manufacture 181(1)

U. P. General Clauses Act (1 of 1904)

—S. 24—U. P. Municipal Account Code, R. 60—Accused refusing to pay octroi duty as being excessive—Matter referred to Octroi Superintendent and duty assessed by him—Failure to pay duty within sixty days—Accused held guilty of breach of R. 60 320(2)

U. P. Land Revenue Act (3 of 1901)

—S. 36 — Mortgage — Construction—
 Usufructuary mortgage of zemindari—
 Mortgagee giving lease for term of mort-
 gage of same—Suit for arrears of rent by
 mortgagee—Equity of redemption sold in
 execution of decree—Subsequent suit for
 arrears of rent—Mortgagor is liable to
 pay rent as long as mortgage lasted whe-
 ther or not he became exproprietary
 tenant of zamindari 268

—S. 36—Agra Tenancy Act (1901),
 S. 10—Defendant, joint-proprietor in
 mahal, mortgaging his *sir* and khudkasht
 lands to plaintiff and then entering into
 agreement to pay certain rent in respect
 of these lands—Assistant Collector ac-
 cepting that rent as fair rent under S. 36,
 U. P. Land Revenue Act—Plaintiff suing
 for rent on basis of that agreement—De-
 fendant is estopped from objecting that
 other cosharers should have joined in suit
 —It was competent to Assistant Col-
 lector to accept agreement of rent bet-
 ween parties 252a

—Ss. 111 and 112—Suit for partition
 —Objection by persons not recorded as
 cosharers—Decision in favour of objectors
 —Ss. 111 and 112 have no application—
 No appeal lay to District Judge 256

U. P. Municipal Account Code

—R. 60 — Accused refusing to pay
 octroi duty as being excessive — Matter
 referred to Octroi Superintendent and
 duty assessed by him — Failure to pay
 duty within sixty days—Accused held
 guilty of breach of R. 60—U. P. Muni-
 cipalities Act (1900) — U. P. General
 Clauses Act (1904), S. 24 320 (2)

U. P. Municipalities Act (1 of 1900)

—U. P. Municipal Account Code, R. 60
 —Accused refusing to pay octroi duty as
 being excessive — Matter referred to
 Octroi Superintendent and duty assessed
 by him—Failure to pay duty within sixty
 days—Accused held guilty of breach of
 R. 60 320 (2)

U. P. Municipalities Act (2 of 1916)

—S. 155—Octroi duty—Person intro-
 ducing goods into limits of Municipality,
 e. g., broker is liable to pay 85 (2)

—S. 307 (b)—Failure to comply with
 notice — Continuous fine held illegal—
 When daily fine may be imposed— Prin-
 ciple stated 266

—S. 326— Suit against Municipality
 for declaration that platform is ancestral
 property and for injunction— Suit is in
 substance one for declaration of title—
 Exemption in S. 326, Cl. (4) is not ap-
 plicable—Suit commencing before expiry
 of two months after service of notice un-
 der S. 326 (1) is premature 16

—S. 326 (1)—S. 326 (1) does not ap-
 ply to criminal proceedings 267a

U. P. Prevention of Adulteration Act (6 of 1912)

—Ss. 4 and 12—Sanction under S. 12
 subsequent to offence—Prosecution is not
 bad 99a

—S. 6—S. 6 does not apply to commis-
 sion agents 99b

Wajibularz

—Entry in—Extract from wajibularz
 recording custom of pre-emption is prima
 facie proof of its existence 382 (1)

—Entry in — Value of— Resident in
 village dying without heirs — Zamindar
 and not Crown held entitled to site and
 house by grant—Escheat 154

—Entry in—Payment of parjote held
 based on agreement and not custom—
 Parjote can be recovered by suit (SB) 128

Workman's Breach of Contract Act (13 of 1859)

—Ss. 1 and 2— Application under
 Ss. 1 and 2 should not be summarily dis-
 posed 417a

—S. 1—Dealer in stones is not artificer
 workman or labourer and agreement to
 supply stones does not come under the
 Act 381 (1)

—S. 2—Smallness of advance is not
 justification for refusal to perform con-
 tract 211 (1)

COMPARATIVE TABLES

TABLE No. I

Showing seriatim the pages of OTHER REPORTS, JOURNALS AND PERIODICALS for the year 1918, with corresponding references of the ALL INDIA REPORTER.

N.B.—Column No. 1 denotes pages of OTHER JOURNALS.

Column No. 2 denotes corresponding references of the ALL INDIA REPORTER.

I. L. R. 40 Allahabad=All India Reporter

ILR	A I R	ILR	A I R	ILR	A I R	ILR	A I R	ILR	A I R	ILR	A I R
1	1918 A 389	116	1918 A 123	256	1918 A 201	429	1918 A 268	590	1918 A 333		
7	" " 425	119	" " 353	271	" " 260	434	" " 194	593	" PC 87		
12	" " 394	122	" " 209	279	" " 306	446	" " 283	605	" A 219		
17	" " 391	125	" " 234	282	" " 211	449	" " 86	610	" " 109		
19	" " 307	128	" " 181	284	" " 189	461	" " 102	612	" " 418		
21	" " 332	135	" " 167	292	" " 412	470	" PC 25	615	" " 126		
24	" " 332	138	" " 258	300	" " 177	487	" " 70	617	" " 429		
28	" " 238	140	" " 343	307	" " 279	497	" " 53	619	" " 74		
32	" " 415	142	" " 222	314	" " 294	505	" A 324	626	" " 286		
35	" " 326	144	" " 329	322	" " 263	507	" " 134	630	" " 183		
38	" " 338	147	" " 275	325	" " 72	512	" " 344	637	" " 241		
39	" " 215	153	" " 271	332	" " 235	515	" " 183	641	1919 " 455		
41	" " 345	159	1917 PC 12	338	" " 243	517	" " 390	646	1918 " 221		
45	" " 121	171	" " 188	341	" " 69	518	" " 393	648	" " 152		
51	" " 210	177	1918 A 84	353	" " 232	522	" " 363	652	" " 349		
52	" " 398	178	" " 359	358	" " 223	525	" " 290	656	" " 249		
56	" " 128	187	" " 211	360	" " 283	536	1919 " 420	659	" " 96		
60	" " 410	197	" " 402	364	" " 186	541	1918 PC 45	661	" " 99		
68	" " 229	198	" " 216	367	" " 126	551	" A 105	663	" " 79		
75	" " 368	203	" " 76	372	" " 257	553	" " 97	665	" " 308		
77	" " 377	206	" " 330	374	" " 223	555	" " 319	666	" " 355		
79	" " 111	209	" " 242	381	" " 194	558	1919 " 453	668	" " 92		
81	" " 406	211	" " 254	384	" " 184	563	1918 " 124	670	" " 417		
84	" " 174	213	" " 248	387	" " 246	565	" " 399	672	" " 328		
86	" " 324	216	" " 405	393	" " 163	569	" " 266	674	" " 422		
89	" " 419	219	" " 238	407	" PC 34	572	" " 259	680	" " 305		
93	" " 185	221	1919 " 249	411	" A 296	575	" " 255	683	" " 386		
96	" " 408	228	1918 " 292	416	" " 111	577	" " 409	686	" " 420		
103	" " 209	235	" " 285	420	" " 107	579	" " 98				
105	" " 320	238	1919 " 148	423	" " 226	582	" " 363	690	" " 188		
109	" " 366	246	1918 " 181	425	" " 192	584	" " 81	692	" " 115		

16 Allahabad Law Journal=All India Reporter

ALJ	A I R	ALJ	A I R	ALJ	A I R	ALJ	A I R	ALJ	A I R	ALJ	A I R
1	1917 PC 146	105	1918 A 265	217	1918 A 279	325	1918 A 133	443	1918 A 342		
11	1918 A 209	107	" " 248	223	" " 243	327	" " 226	445	" " 134		
12	" " 353	109	" " 330	225	" " 294	329	" " 86	449	" " 344		
15	" " 234	113	1917 PC 190	231	" " 238	339	" " 223	451	" " 341		
17	1917 PC 181	121	1918 A 201	233	" " 263	345	" " 102	453	" " 409		
30	1918 A 258	132	" " 285	236	" " 296	353	1917 PC 121	454	" " 337		
32	" " 402	137	" " 292	239	" " 290	360	1918 A 69	456	" " 363		
33	1917 PC 197	143	" " 285	241	1917 PC 101	373	" " 233	458	" " 106		
39	1918 A 343	146	" " 270	245	" " 188	374	" " 324	459	" " 384		
41	" " 298	148	" " 267	249	1918 A 177	377	" " 246	462	" " 333		
44	" " 167	150	" " 405	256	" " 72	383	" " 130	465	" " 393		
46	" " 384	153	1919 " 249	262	" " 78	384	" " 268	468	" " 396		
49	" " 181	157	1918 " 299	263	" " 103	388	" " 335	472	" " 403		
55	" " 222	158	1919 " 148	265	1917 PC 95	390	" " 363	474	" " 124		
57	1917 PC 179	164	1918 " 211	271	" " 111	394	" " 309	476	" " 109		
61	" " 196	167	" " 228	279	1918 A 102	407	" " 381	478	" " 160		
64	1918 A 275	169	" " 189	280	" " 95	409	" PC 3	486	" " 126		
68	" " 329	174	" " 232	281	1917 PC 105	414	" A 168	488	" " 181		
70	" " 342	178	" " 288	294	1918 A 872	426	" " 133	489	" " 407		
71	" " 216	182	" " 412	298	" " 111	428	" " 390	490	" " 391		
76	" " 271	189	" " 186	301	" " 126	429	" " 180	492	" " 323		
81	" " 79	191	" " 184	305	" " 288	432	" " 320	493	" " 369		
85	" " 76	193	" " 131	307	" " 274	433	" " 192	495	" " 418		
87	" " 242	201	" " 260	309	" " 194	437	" " 105	498	" " 125		
88	" " 254	208	" " 257	311	" " 228	438	" " 97				
91	" " 359	210	" " 247	313	" " 194	440	" " 177	499	" " 109		
93	" " 211	212	" " 252	323	" " 107	441	" " 186	501	" " 365		

16 Allahabad Law Journal=All India Reporter—(Concl'd.)															
ALJ	A I R	ALJ	A I R	ALJ	A I R	ALJ	A I R	ALJ	A I R	ALJ	A I R	ALJ	A I R	ALJ	A I R
503	1918 A 132	584	1918 A 356	669	1919 A 360	752	1918 A 397	884	1918 A 56						
504	" " 427	587	1919 " 420	679	1918 " 355	754	1919 " 112	892	" " 13						
505	" " 401	590	1918 " 84	681	" " 99	760	1918 " 100	895	" " 17						
506	" " 374	592	1919 " 453	683	" " 188	762	" " 303	899	" " 20						
507	" " 376	596	1918 " 399	685	" " 339	765	" " 115	900	" " 49						
509	" " 429	600	" " 406	689	" " 328	776	" " 318	902	" " 60						
510	" " 387	601	" PC 37	691	" " 305	777	" " 11	905	" PC 249						
511	" " 325	607	" " 84	693	" PC 53	779	" " 428	915	" " 217						
513	1917 PC 116	611	" A 241	700	" A 152	782	" " 52	918	" A 65						
522	1918 " 8	614	" " 85	703	" " 308	787	" " 9	921	" " 68						
527	" A 266	615	1919 " 379	704	" " 92	790	" " 61	923	" " 67						
530	" " 327	619	1918 " 249	706	" " 219	793	" " 16	924	" " 12						
531	" " 379	621	" " 221	711	" " 349	796	" " 392	926	" " 1						
533	" " 381	623	" " 258	715	" " 417	800	" PC 11	929	" " 55						
535	" " 415	625	" " 93	717	" " 422	817	" " 77	933	" " 49						
536	" " 216	627	" " 259	721	" " 113	825	" " 70	938	" " 21						
537	1917 PC 128	630	" " 96	725	" PC 74	833	" " 81	941	" " 24						
548	1918 A 290	632	" " 85	731	" A 420	841	" A 2	964a	" " 221						
557	" " 278	633	" " 183	734	" " 100	859	" " 14	964b	" PC 85						
561	" " 286	639	" " 81	737	" " 71	864	" " 245	969	" " 102						
564	" " 255	644	" " 79	740	" " 386	865	" PC 45	987	" A 38						
567	" " 93	646	" " 74	742	" " 218	871	1919 A 450	992	" " 67						
569	" PC 41	653	" " 154	747	" " 226	875	1918 " 21	993	" PC 168						
576	" " 35	662	1919 " 455	749	" " 203	879	" " 227	996	" A 40						
581	" A 319	666	1918 A 388	750	" " 367	881	" " 23	1017	" " 63						

19 Criminal Law Journal & 43 to 48 Indian Cases=All India Reporter
Please refer to COMPARATIVE TABLE No. I in A. I. R. 1918 Lahore.

TABLE No. II

Showing seriatim the pages of the ALL INDIA REPORTER, 1918 ALLAHABAD, with corresponding references of other REPORTS, JOURNALS AND PERIODICALS.¹

N. B.—Column No. 1 denotes pages of the ALL INDIA REPORTER, 1918 ALLAHABAD.

Column No. 2 denotes corresponding references of other REPORTS, JOURNALS AND PERIODICALS,

A. I. R. 1918 Allahabad=Other Journals—(Contd.)

A I R	Other Journals	A I R	Other Journals	A I R	Other Journals	A I R	Other Journals
1	41 All 197	17	41 All 164	49 (2)	41 All 97	67 (1)	20 Cr L J 2
	16 A L J 926		16 A L J 895		16 A L J 933	67 (2)	48 I C 686
	48 I C 673		48 I C 483		48 I C 470		16 A L J 992
	20 Cr L J 33		20 Cr L J 8	52	41 All 54		20 Cr L J 46
2	41 All 1	20	41 All 40		16 A L J 782	68	48 I C 499
	16 A L J 841		16 A L J 899		47 I C 837		16 A L J 921
	48 I C 94		48 I C 364	55	41 All 104		20 Cr L J 19
9	41 All 51	21 (1)	41 All 34		16 A L J 929	69	45 I C 540
	16 A L J 787		16 A L J 875		47 I C 926	FB	40 All 341
	47 I C 842		48 I C 212	56	41 All 116		16 A L J 860
11	41 All 42	21 (2)	41 All 200		16 A L J 884	71	46 I C 747
	16 A L J 777		16 A L J 938		48 I C 344		16 A L J 737
	47 I C 610		48 I C 443		19 Cr L J 1004	72	44 I C 1005
12	41 All 108	23	41 All 37	60	41 All 60		40 All 325
	16 A L J 924		16 A L J 881		16 A L J 902		16 A L J 256
	48 I C 422		46 I C 764		48 I C 481	74	46 I C 566
13	41 All 47	24	41 All 68		20 Cr L J 6		40 All 619
	16 A L J 892		16 A L J 941	61	41 All 111		16 A L J 646
	48 I C 353		48 I C 450		16 A L J 790	76	43 I C 870
14	41 All 28	38	41 All 125		47 I C 845		40 All 203
	16 A L J 859		16 A L J 987	63	41 All 219		16 A L J 85
	46 I C 338		48 I C 605		16 A L J 1017	78	44 I C 998
15	41 All 154	40	41 All 130		48 I C 815		16 A L J 262
	17 A L J 44		16 A L J 996	65	48 I C 502	79 (1)	46 I C 563
	47 I C 222		48 I C 847		16 A L J 918		40 All 663
16	41 All 162	49 (1)	41 All 45		20 Cr L J 22		16 A L J 644
	16 A L J 793		16 A L J 900	67 (1)	48 I C 493		
	47 I C 848		48 I C 367		16 A L J 923	79 (2)	47 I C 311

Comparative Tables

A. I. R. 1918 Allahabad=Other Journals—(Contd.)

A. I. R. 1918 Allahabad=Other Journals—(Contd.)				AIR				Other Journals				AIR				Other Journals			
AIR	Other Journals	AIR	Other Journals	AIR	Other Journals	AIR	Other Journals	AIR	Other Journals	AIR	Other Journals	AIR	Other Journals	AIR	Other Journals	AIR	Other Journals		
79 (2)16	A L J	81	109 (2)16	A L J	476	174	19	Cr L J	145	211 (1)19	Cr L J	240							
81	46	I C	559	109	19	Cr L J	722	175	43	I C	175	211 (2)43	I C	645					
	40	All	584	111 (1)43	I C	108	176	43	I C	180		40	All	187					
	16	A L J	639		40	All	79	177 (1)47	I C	577		16	A L J	98					
84	47	I C	891		19	Cr L J	76		16	A L J	440	215	42	I C	914				
	40	All	177	111 (2)44	I C	929	177 (2)44	I C	919		40	All		39					
	16	A L J	590		40	All	416		40	All	300		15	A L J	822				
85 (1)47	I C	91		16	A L J	298		16	A L J	249		19	Cr L J	2					
	16	A L J	614		19	Cr L J	401	180	45	I C	991	216 (1)46	I C	412					
	19	Cr L J	895	113	47	I C	801		16	A L J	429		16	A L J	536				
85 (2)46	I C	848		16	A L J	721	181 (1)46	I C	294		19	Cr L J	732						
	16	A L J	632		19	Cr L J	949		16	A L J	488	216 (2)44	I C	24					
	19	Cr L J	832	115	47	I C	599		19	Cr L J	710		40	All	198				
86	44	I C	988		40	All	692	181 (2)47	I C	299		16	A L J	71					
	40	All	449		16	A L J	765	SB	40	All	128	218	47	I C	850				
	16	A L J	329	121	43	I C	134		16	A L J	49		16	A L J	742				
92	48	I C	38		40	All	45	182	46	I C	295	219	48	I C	18				
	40	All	668		15	A L J	893		16	A L J	503		16	A L J	706				
	16	A L J	704	124	46	I C	302		19	Cr L J	711		40	All	605				
93	47	I C	72		40	All	563	183 (1)45	I C	985		221 (1)48	I C	476					
	16	A L J	507		16	A L J	474		40	All	515		16	A L J	964				
	19	Cr L J	876		19	Cr L J	718		16	A L J	426	221 (2)46	I C	971					
94	46	I C	542	125	45	I C	1005	183 (2)46	I C	584		40	All	646					
95	44	I C	967		16	A L J	493	FB	16	A L J	633		16	A L J	621				
	16	A L J	280		19	Cr L J	669		40	All	630	222	44	I C	689				
	19	Cr L J	439	126 (1)46	I C	290	184	44	I C	629		40	All	142					
96	47	I C	16		40	All	615		40	All	384		16	A L J	55				
	40	All	659		16	A L J	486		16	A L J	191	223	45	I C	4				
	16	A L J	630		19	Cr L J	706	185	43	I C	179		40	All	374				
97 (1)47	I C	561	126 (2)44	I C	923		40	All		93		16	A L J	339					
	40	All	553		40	All	367		15	A L J	886	226 (1)47	I C	852					
	16	A L J	438		16	A L J	301	186 (1)45	I C	761		16	A L J	747					
97 (2)43	I C	827		45	I C	329		16	A L J	441		226 (2)45	I C	21					
	19	Cr L J	235	SB	40	All	56	186 (2)44	I C	673		40	All	423					
98	47	I C	4		15	A L J	873		40	All	364		16	A L J	327				
	40	All	579	129	43	I C	436		16	A L J	189	227	48	I C	220				
	16	A L J	625		40	All	116		19	Cr L J	369		16	A L J	879				
99	46	I C	514		15	A L J	912	188	46	I C	761	228 (1)44	I C	608					
	40	All	661		19	Cr L J	149		40	All	690		40	All	358				
	16	A L J	681	180	45	I C	513		16	A L J	683		16	A L J	167				
	19	Cr L J	738		16	A L J	383	189	44	I C	675	228 (2)45	I C	146					
100 (1)46	I C	410		13	Cr L J	603		40	All	284		16	A L J	311					
	16	A L J	734	131	43	I C	636		16	A L J	169		19	Cr L J	482				
	19	Cr L J	730	FB	40	All	246		19	Cr L J	371	229	43	I C	490				
100 (2)47	I C	810		16	A L J	193	192	45	I C	773		40	All	68					
	16	A L J	760	133	45	I C	149		40	All	425		15	A L J	899				
	19	Cr L J	958		16	A L J	925		16	A L J	433	232	44	I C	666				
102 (1)44	I C	965		19	Cr L J	485	194 (1)45	I C	29		40	All		353					
	16	A L J	279	134	45	I C	837		40	All	331		16	A L J	174				
	19	Cr L J	437		40	All	507		16	A L J	309	233	45	I C	511				
102 (2)44	I C	980		16	A L J	445	194 (2)45	I C	37		16	A L J		373					
	40	All	461		19	Cr L J	645		40	All	434		19	Cr L J	607				
	16	A L J	345	136	46	I C	819		16	A L J	313	234	43	I C	520				
105	47	I C	562	SB	19	Cr L J	803	201	44	I C	596		40	All	125				
	40	All	551	152	48	I C	26		16	A L J	121		16	A L J	15				
	16	A L J	437		40	All	648		40	All	256	235	44	I C	728				
106	46	I C	407		16	A L J	700	208	47	I C	830		40	All	832				
	16	A L J	458	154	47	I C	823		16	A L J	749		16	A L J	132				
	19	Cr L J	727		16	A L J	653	209 (1)43	I C	438		238 (1)43	I C	531					
107	44	I C	975	160	47	I C	659		40	All	103		40	All	219				
	40	All	420		16	A L J	478		16	A L J	11		16	A L J	231				
	16	A L J	323		19	Cr L J	985		19	Cr L J	150	238 (2)42	I C	917					
	19	Cr L J	447	167	45	I C	560	209 (2)43	I C	522		40	All	28					
108	44	I C	969		40	All	135		40	All	122		15	A L J	813				
	16	A L J	268		16	A L J	44		15	A L J	920		19	Cr L J	5				
	19	Cr L J	441	168	45	I C	519	210	45	I C	323	240	43	I C	533				
109 (1)45	I C	1006		40	All	393		40	All	51		241	46	I C	925				
	16	A L J	610		16	A L J	414		15	A L J	862		40	All	637				
	19	Cr L J	499		19	Cr L J	615	211 (1)43	I C	832			16	A L J	611				
109 (2)46	I C	402	174	43	I C	438		40	All	282		242	48	I C	914				
				40	All	84		16	A L J	164									

A. I. R. 1918 Allahabad=Other Journals.—(Contd.)

1918 Allahabad

AIR	Other Journals	AIR	Other Journals	AIR	Other Journals	AIR	Other Journals
242	40 All 209	371	19 Cr L J 269	317	43 I C 652	343	19 Cr L J 188
	16 A L J 87	274	45 I C 34	318	46 I C 701		40 All 140
243	44 I C 739		16 A L J 307		16 A L J 776	344	46 I C 373
	40 All 338	275	44 I C 28		19 Cr L J 781		40 All 512
	16 A L J 223		40 All 147	319	47 I C 903		16 A L J 449
	19 Cr L J 387		16 A L J 64		40 All 555	345	42 I C 924
244	43 I C 525		19 Cr L J 865		16 A L J 581		40 All 41
245	48 I C 124	278	43 I C 897	320 (1)	46 I C 48		15 A L J 841
	16 A L J 864		16 A L J 557		16 A L J 432		19 Cr L J 12
246	45 I C 488	279	44 I C 682		19 Cr L J 688	346	43 I C 573
	40 All 387		40 All 307	320 (2)	43 I C 446		39 All 626
	16 A L J 377		16 A L J 217		40 All 105	349	47 I C 1003
247	44 I C 582		19 Cr L J 378		15 A L J 909		40 All 652
	16 A L J 210	282	43 I C 110		19 Cr L J 158		16 A L J 711
	19 Cr L J 358		15 A L J 883	322	42 I C 995	350	46 I C 736
248	43 I C 984		19 Cr L J 78		15 A L J 796	351	43 I C 577
	40 All 213	283	44 I C 686		19 Cr L J 35		19 Cr L J 161
	16 A L J 107		40 All 360	323	46 I C 906	352	45 I C 549
249	46 I C 920		16 A L J 178		16 A L J 492	353	43 I C 590
	40 All 656		19 Cr L J 382	324 (1)	43 I C 129		40 All 119
	16 A L J 619	285	45 I C 518		40 All 86		16 A L J 12
250	45 I C 546		16 A L J 143		15 A L J 877		19 Cr L J 174
252	44 I C 513		40 All 235	324 (2)	45 I C 494	355 (1)	42 I C 997
	16 A L J 212	286	46 I C 900		40 All 505		15 A L J 850
254	43 I C 932		40 All 626		16 A L J 374		19 Cr L J 37
	40 All 211		16 A L J 561	325	46 I C 103	355 (2)	46 I C 647
	16 A L J 88	288	45 I C 31		16 A L J 511		40 All 666
255	46 I C 905		40 All 446	326	42 I C 914		16 A L J 679
	40 All 575		16 A L J 305		40 All 35	356	47 I C 905
	16 A L J 564	289	43 I C 519		15 A L J 819		16 A L J 584
256	45 I C 544	290 (1)	44 I C 720		19 Cr L J 2	357	46 I C 652
257	44 I C 463		16 A L J 239	327	46 I C 101	359	43 I C 553
	40 All 372	290 (2)	46 I C 893		16 A L J 530		40 All 178
	16 A L J 208		40 All 525	328	47 I C 980		16 A L J 91
	19 Cr L J 351		16 A L J 548		40 All 672	361	42 I C 1003
258 (1)	46 I C 1004	292	43 I C 514		16 A L J 689		19 Cr L J 43
	16 A L J 623		40 All 228	329	43 I C 617	363 (1)	46 I C 394
	19 Cr L J 860		16 A L J 137		40 All 144		40 All 582
258 (2)	43 I C 622	294	44 I C 717		16 A L J 68	363 (2)	45 I C 462
	40 All 138		40 A' 314		19 Cr L J 201		40 All 522
	16 A L J 30		16 A L J 225	330	46 I C 669		16 A L J 390
	19 Cr L J 206	296 (1)	43 I C 800		40 All 206	365	46 I C 160
259	46 I C 976		15 A L J 756		16 A L J 109		16 A L J 501
	40 All 572		19 Cr L J 224	331	43 I C 632		19 Cr L J 704
	16 A L J 627	296 (2)	44 I C 697	332	42 I C 915	366	43 I C 557
260	43 I C 823		40 All 411		40 All 21		40 All 109
	40 All 271		16 A L J 236		15 A L J 844		15 A L J 914
	16 A L J 201	293	43 I C 785		19 Cr L J 4	367	47 I C 885
	19 Cr L J 231		16 A L J 41	333	46 I C 390		16 A L J 750
263	44 I C 227		19 Cr L J 209		40 All 590	368	43 I C 160
	40 All 322	299	44 I C 35		16 A L J 462		40 All 75
	16 A L J 233		16 A L J 157n	335	45 I C 500		15 A L J 885
264	45 I C 534		19 Cr L J 243		16 A L J 388	369 (1)	42 I C 913
265	44 I C 113	303 (1)	43 I C 623		19 Cr L J 596		19 Cr L J 1
	16 A L J 105		19 Cr L J 207	336	43 I C 671	369 (2)	46 I C 85
	19 Cr L J 257	303 (2)	46 I C 660	337	46 I C 382		16 A L J 493
266	46 I C 150		16 A L J 762		16 A L J 454	371	43 I C 74
	40 All 569	305	47 I C 947	338	42 I C 922	372	45 I C 515
	16 A L J 527		40 All 680		40 All 138		16 A L J 294
	19 Cr L J 694		16 A L J 691		15 A L J 824		19 Cr L J 611
267	44 I C 592	306	46 I C 865		19 Cr L J 10	373	43 I C 2
	16 A L J 148		40 All 279	339	47 I C 954	374 (1)	46 I C 75
	19 Cr L J 368	307	42 I C 1008		16 A L J 685		16 A L J 506
268	45 I C 529		40 All 19	341	46 I C 376	374 (2)	42 I C 1006
	40 All 429		15 A L J 846		16 A L J 451		15 A L J 808
	16 A L J 384		19 Cr L J 48	342 (1)	43 I C 642		19 Cr L J 46
270	44 I C 542	308	46 I C 733		16 A L J 70		
	16 A L J 146		40 All 665	342 (2)	45 I C 728	375	43 I C 57
271	44 I C 125		16 A L J 703		16 A L J 443	376	46 I C 82
	40 All 153	309	45 I C 451	343	43 I C 604		
	16 A L J 76		16 A L J 394		16 A L J 39		16 A L J 507

Comparative Tables

33

A. I. R. 1918 Allahabad=Other Journals—(Concl'd.)

A.I.R.	Other Journals	A.I.R.	Other Journals	A.I.R.	Other Journals	A.I.R.	Other Journals
377	43 I C 62	390	46 I C 156	403 (1)15	A L J 807	415 (2)19	Cr L J 40
	40 All 77		40 All 517		42 I C 1005	417	40 All 670
	15 A L J 860		16 A L J 428		19 Cr L J 45		16 A L J 715
378	42 I C 1006		19 Cr L J 700	403 (2)16	A L J 472		47 I C 441
	89 All 722	391 (1)46	I C 158		46 I C 193		19 Cr L J 925
	15 A L J 793		16 A L J 490	405	40 All 216	418	40 All 612
	19 Cr L J 46		19 Cr L J 702		16 A L J 150		16 A L J 495
379	46 I C 83	391 (2)42	I C 858		42 I C 936		46 I C 71
	16 A L J 531		40 All 17	406 (1)16	A L J 600	419	40 All 89
880	43 I C 650		15 A L J 849		47 I C 875		15 A L J 863
381 (1)45	I C 502	392	47 I C 861		19 Cr L J 975		42 I C 968
	16 A L J 407		16 A L J 796	406 (2)40	All 81	420	40 All 686
	19 Cr L J 598	393	46 I C 186		15 A L J 881		16 A L J 731
381 (2)46	I C 97		40 All 518		42 I C 941		47 I C 805
	16 A L J 533		16 A L J 465	407	16 A L J 489		19 Cr L J 953
382 (1)43	I C 854	394	42 I C 888		46 I C 414	422	40 All 674
382 (2)42	I C 927		40 All 12		19 Cr L J 734		16 A L J 717
	40 All 24		15 A L J 801	408	40 All 96		48 I C 14
	15 A L J 817	396	46 I C 190		15 A L J 922	425	40 All 7
	19 Cr L J 15		16 A L J 468		42 I C 944		15 A L J 809
884 (1)43	I C 656	397	47 I C 864	409	40 All 577		42 I C 856
	16 A L J 46		16 A L J 752		16 A L J 453	426	43 I C 154
384 (2)46	I C 887	398	42 I C 903		46 I C 522	427	16 A L J 504
	16 A L J 459		40 All 52		19 Cr L J 746		46 I C 115
386	47 I C 833		15 A L J 857	410	40 All 60	428	16 A L J 779
	40 All 683	399	47 I C 867		15 A L J 867		47 I C 400
	16 A L J 740		40 All 565		42 I C 956	429 (1)40	All 617
387	46 I C 145		16 A L J 596	412	40 All 292		16 A L J 509
	16 A L J 510		19 Cr L J 967		16 A L J 182		46 I C 125
	19 Cr L J 689	401 (1)16	A L J 505		44 I C 88	429 (2)15	A L J 590
388	47 I C 856		46 I C 76	415 (1)16	A L J 535		18 Cr L J 815
	16 A L J 666	401 (2)45	I C 531		46 I C 99		41 I C 335
389	42 I C 855	402	40 All 197	415 (2)40	All 32	431	39 All 689
FB	40 All 1		16 A L J 32		15 A L J 805		15 A L J 769
	15 A L J 835		43 I C 672		42 I C 1000		42 I C 818

THE ALL INDIA REPORTER 1918

ALLAHABAD HIGH COURT

* A. I. R. 1918 Allahabad 1

TUDELL, J.

Hadiyar Khan—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 538 of 1918, Decided on 4th September 1918, from an order of Sess. Judge, Kumaun.

* Criminal P. C. (1898), S. 477 — S. 477 does not lay down that trial under it should be summary one — At conclusion of trial Sessions Court charging defence witness with perjury—Court refusing to grant time to accused and sentencing him there and then—Case should be retried as trial was irregular.

Section 477 gives the power to a Court of Session to charge a person for any offence referred to in S. 195 of the Code and committed before it. It further gives the Court of Session the power to commit for trial or to admit to bail and to try the person for the charge it has framed, but the section nowhere lays it down that the trial is to be a summary one, nor does it anywhere demand a decision which should be more prompt and speedy than that of any ordinary trial. The very powers granted in that section to a Court of Session are so unusual that it is the bounden duty of any Court exercising them to be at pains to give the accused a fair and impartial trial, in view of the fact that the Court has already had before it certain evidence upon which it may have already formed an opinion. [P 2 C 1]

At the conclusion of a trial in a Sessions Court, the Sessions Judge charged one of the defence witnesses with the offence of perjury and proceeded there and then to try him under the powers conferred upon the Court by S. 477. The accused repeatedly asked for time to enable him to obtain legal advice and to put in his defence but the Court refused his prayer and convicted and sentenced him:

Held: that the Sessions Judge had, in the exercise of his jurisdiction, acted hastily and irregularly and had not given the accused a fair trial and that therefore the case must be retried. [P 2 C 2]

G. W. Dillon—for Appellant.

Lalit Mohan Banerji—for the Crown.

1918 A/1 & 2

Judgment.—The appellant Hadiyar Khan has been convicted of the offence of perjury and has been sentenced to four years' rigorous imprisonment, including three months' solitary confinement, by the learned Sessions Judge of the Naini Tal District. The circumstances under which the appellant was tried and convicted are somewhat unusual. Two men Azizullah and Kifayatullah were upon their trial in the Court of Session at Pilibhit on a charge of attempted murder under S. 307, I. P. C. Hadiyar Khan was called as a witness for the defence to prove that Azizullah was actually dining with him at the time the offence is said to have been committed. The trial of Azizullah and Kifayatullah concluded on 2nd August 1918 at about 5 p. m. and the Judge convicted them to ten years' rigorous imprisonment under S. 307. On that very same date, namely, 2nd August 1918, the Judge passed an order issuing notice to the defence witnesses to show cause why they should not be prosecuted for the offence of perjury. Then the learned Sessions Judge changed his mind at once in respect to the present appellant Hadiyar Khan. As a perusal of his judgment will show, his attention was called to the provisions of S. 477, Criminal P. C., and he there and then proceeded to try Hadiyar Khan, under the powers granted by that section, for the offence of perjury which he charged against him. I have examined the record of the trial.

Hadiyar Khan asked the Sessions Judge for time to enable him to appoint a lawyer and to consult him so as to enable him to put in his defence. The Sessions Judge declined to adjourn the case or to give him any further time,

whereupon Hadiyar Khan refused to plead or to take any steps in his defence. As the Judge's judgment shows, he began the case against Hadiyar Khan at 5 o'clock and Hadiyar Khan from the very beginning asked for a postponement. Postponement was refused. He therefore refused to cross-examine. He refused to make any attempt to defend himself. He asked repeatedly to be allowed to obtain legal advice. The Judge declined to give him any further time and on the evidence taken in the presence of the accused he convicted him and sentenced him as mentioned above. He remarks in his judgment:

"Section 477 demands a prompt and speedy decision, which will bring home to the public generally the dangers a man runs in giving false evidence. I am not going to spoil the effect of S. 477 by weakly granting a postponement, which would only mean that the accused would then be able to produce another lot of false witnesses leading to nothing."

Section 477 grants a power which is very seldom exercised. It gives the power to a Court of Session to charge a person for any offence referred to in S. 195 and committed before it. It further gives the Court of Session the power to commit for trial or admit to bail and to try the person for the charge it has framed, but the section nowhere lays it down that the trial is to be a summary trial nor does the section anywhere demand a decision which should be more prompt and speedy than that of any ordinary trial. The very powers granted in that section to a Court of Session are so unusual that it seems to me it is the bounden duty of any Court exercising them to be at pains to give the accused a fair and impartial trial, in view of the fact that the Court has already had before it certain evidence upon which it may have already formed an opinion. I should have thought that a simple sense of justice would have shown to the Court below that Hadiyar Khan was entitled to appoint a pleader, to consult with him and to defend himself just as any ordinary person in an ordinary criminal trial. The learned Sessions Judge has in haste made it impossible for Hadiyar Khan to defend himself. He refused to grant postponement, which he certainly ought to have granted whatever the result, and in my opinion in view of the expressions which he had already used in his judgment

in the case against Azizullah and Kifayatullah, it would have been fairer perhaps to have dealt with Hadiyar Khan in the same manner as that in which he had dealt with the remaining defence witnesses, that is, of taking action against them under S. 476. It is impossible to say that the learned Sessions Judge had not power to try the case. He certainly had the power to do so, but in the exercise of his jurisdiction he has, in my opinion, acted hastily and very irregularly and has not given the appellant a fair trial. In these circumstances without expressing any opinion as to the appellant's guilt I set aside the conviction and sentence.

The case must be retried but it is obvious that it cannot be retried in the same Court. It must be transferred to a calmer atmosphere so as to enable an impartial trial to be held. I therefore direct that the case be retried in the Court of the Sessions Judge of Bareilly instead of in the Court of the Sessions Judge of Kumaun.

V.B./R.K.

Retrial ordered.

A. I. R. 1918 Allahabad 2

PIGGOTT AND WALSH, JJ.

Naimul Haq—Plaintiff—Appellant.

v.

Mohammad Subhanullah — Defendant—Respondent.

First Appeal No. 93 of 1916, Decided on 5th June 1918, from an order of Sub-Judge, Gorakhpur.

(a) **Mussalman Wakf Validating Act, (1913)—Act is not retrospective.**

The Mussalmans Wakf Validating Act is not retrospective in its operation. [P 8 C 2]

Where therefore before the passing of the Mussalman Wakf Validating Act, a Mahomedan made a colourable dedication of his property, the charitable or religious purpose being so unsubstantial as to give to the settlement merely a colour of piety, the real object of the settlor being to create a family settlement in perpetuity:

Held: that the dedication was not valid and did not create a wakf. [P 6 C 2]

(b) **Civil P. C. (1908), S. 92—S. 92 is mandatory and suit claiming any relief in S. 92 must be brought in conformity with its provisions.**

Section 92 is mandatory, and a suit claiming any of the reliefs specified therein must be brought under, and in conformity with, its provisions or not at all. If a plaintiff sets up a trust, "created for public purposes of a charitable or religious nature," and claims "as a person having an interest in the trust" any of the reliefs specified in S. 92, he must do so in accordance with the terms of the section. [P 8 C 2]

Iqbal Ahmad—for Appellant.
Tej Bahadur Sapru and *S. M. Sulaiman*—for Respondent.

Piggott, J.—The plaintiff in this case is the daughter's son and the defendant the son's son of one Maulvi Habibullah Khan who died on 3rd April 1891. The plaintiff's case is that the said Maulvi had, in his life time, made a wakf, or dedication for religious and charitable purposes, under the Mahomedan law of certain property specified at the foot of the plaint; that the defendant is in possession of the said property as muttawali, or trustee of the endowment, but is misconducting himself in various ways, and principally by wasting and alienating the endowed property and by refusing to make payments which he is bound to make under the terms of the endowment. The plaintiff claims to be interested in the trust as a beneficiary under the same, and to be entitled to maintain the suit independently of the provisions of S. 92, Civil P. C. The reliefs sought are a declaration that the property specified at the foot of the plaint is "the wakf property," the removal of the defendant from the post of muttawali, or managing trustee of the endowed property, and the appointment of a new muttawali, to be selected by the Court in its discretion from amongst the persons entitled to be so appointed under the terms of the alleged deed of endowment. A list of these persons, including the plaintiff himself, is appended to the plaint; but none of the other persons in the list has been impleaded as a party to the suit. In the defendant's written statement as originally filed the suit was resisted on a variety of grounds; but it was admitted that a valid endowment or wakf had been made by Maulvi Habibullah Khan of the property in suit. At a later stage the defendant applied to the trial Court for permission to amend his pleadings in this respect, his case being that his admission above referred to had been made upon defective legal advice and amounted to nothing more than an erroneous admission upon a point of law. He was allowed to file an amended pleading, in which he denied that Maulvi Habibullah Khan had ever made a valid wakf of any property, and pleaded more particularly that, on no possible view of the facts or the law, could it be held that there had ever been any dedication to religious

or charitable purposes of the property specified in the lists (b) and (c) appended to the plaint. The case went to trial on issues framed upon the pleadings as thus amended and the plaintiff has no valid ground for complaining of the exercise of a discretion undoubtedly inherent in the trial Court. It may indeed be pointed out at once that it has had to be conceded in argument before us that no wakf was ever made of the property specified in list (b).

The Court below framed a number of issue, but has dismissed the plaintiff's suit, in the main upon a finding that there was never any valid wakf, or dedication of any of the property in suit to religious or charitable purposes. The memorandum of appeal to this Court is a prolix and argumentative document; but in substance three points only are taken and have been argued before us. (a) It is contended that the defendant is estopped from denying that there has been a valid wakf of the property in suit. (b) It is claimed that a valid wakf under Mahomedan law was created by three specified documents, admittedly executed by Maulvi Habibullah Khan; or in the alternative by the first two of these documents; or again in the alternative by the third document, which is the will of the said Habibullah Khan. (c) It is pleaded that, even if the Court should repel the second of the above contentions, in view of the law as laid down by sundry authoritative decisions prior to the passing of the Mussalmans Wakf Validating Act (No. 6 of 1913), the said Act is retrospective in its effect and that the arrangement effected by the will of the deceased Maulvi Habibullah Khan amounts to a valid wakf under the provisions of this statute. On behalf of the respondent each of the above propositions is denied, and it is also sought to support the decision of the Court below on a plea decided by that Court against the defendant, namely (d) that the suit as brought, for the reliefs specified in the plaint, is one which a person claiming an interest in the alleged trust could only maintain under the provisions of S. 92, Civil P. C., so that the plaint ought to have been rejected as it stood, on the ground that it contravenes the provisions of that section and was filed without the consent of the prescribed authority. Strictly speaking, the questions raised in the pleadings (a) and (d) above set forth

are in their nature preliminary to the consideration of the appeal on its merits, as the questions raised in pleadings (b) and (c) could not arise if point (a) were decided in favour of the appellant or point (d) in favour of the respondent. The case has however been fully argued out before us; and I find it practically more convenient to proceed at once to the consideration of the main questions raised by the appeal.

According to the plaint the wakf was created by a deed dated 30th January, 1885, the other 2 deeds referred to in the plaintiff's pleadings being merely supplementary documents serving to supply omissions in, and to give directions required by, the actual deed of wakf. The plaintiff is no doubt entitled to ask that all three documents should be taken into consideration, and even that they should be read together in connexion with his contention that the defendant as muttawali has been acting in contravention of the conditions of the trust; but there are two questions which he cannot be allowed to confuse. His case in the Court below was that Maulvi Habibullah Khan created the wakf in question in his lifetime; he never set up a testamentary wakf intended to come into operation at the death of the testator. Had he done so, certain questions would have been raised as to which there has been no inquiry in the Court below; it has not been ascertained what heirs Maulvi Habibullah Khan left him surviving at the moment of his death, or whether the said heirs gave their consent to the wakf so as to make it binding in respect of more than one-third of the property of the testator. In the eye of the Mahmedan law a wakf is a transfer of property whereby the transferor or wakf divests himself of the ownership of the same in favour of the Almighty: there is consequently a very wide difference between setting up a transfer effected by Maulvi Habibullah Khan on 30th January 1885, and alleging a transfer by testamentary bequest, which took effect only on the death of the testator on 3rd April 1881. If the result of the case turned upon it, which I do not think it does, I should entertain grave doubts as to whether it was open to this Court, in appeal, to find that there had been no wakf by Maulvi Habibullah Khan in his lifetime but a valid testamentary wakf taking

effect from the date of his death. With regard to the principles of law applicable to the consideration of the three main documents in this case we were referred to the usual standard authorities, by which the law on the subject was settled prior to the passing of Act No. 6 of 1913. I set them down here for convenience of reference.

Mahomed Ahsanulla Chowdhry v. Amarchand Kundu (1), *Rasamaya Dhur Chowdhuri v. Abul Fata Mohomed Ishak* (2), *Abul Fata Mohomed Ishak v. Rasamaya Dhur Chowdhuri* (3), *Mujibunnissa v. Abdur Rahim* (4), *Muhammed Munawar Ali v. Razia Bibi* (5) and *Abdul Gafur v. Nizamuddin* (6).

Another case of considerable interest, which may also be referred to in connexion with the question of the retrospective effect of Act 6 of 1913, is that of *Ramanadan Chettiar v. Vava Levvai Marakayar* (7). So far as the case now before us is concerned, I do not think I can state the effect of these decisions better than by quoting the words of a learned Judge of this Court in *Mazhar Husain Khan v. Abdul Hadi Khan* (8):

"A valid wakf is created if the owner of the property, the subject of the wakf, divests himself of it and appropriates it to charitable or religious purposes. . . . In order to constitute a valid wakf there must be a substantial dedication of the property to religious or charitable uses at some time or other. . . . There must be a substantial and not merely a colourable dedication of the property; the religious or charitable purpose should not be so unsubstantial or illusory as to give to the settlement merely a colour of piety, the real object being the aggrandisement of the family."

Judged by these tests, the "dedication" said to be effected by the deed of 30th January 1885, will not bear examination for a moment. There is no substantial and effective alienation of the property; the transaction is "illusory" in the plainest sense of the word. The man who executed that document had no intention whatever of parting, in his own lifetime, with the effective ownership of any property whatsoever. He makes a great parade of piety, learning and liberality, but he is at the utmost pains to take

(1) [1890] 17 Cal. 498=17 I. A. 28 (P. C.).

(2) [1891] 18 Cal. 399.

(3) [1895] 22 Cal. 619=22 I. A. 76 (P. C.).

(4) [1901] 23 All. 233=28 I. A. 15 (P. C.).

(5) [1905] 27 All. 320=32 I. A. 86 (P. C.).

(6) [1893] 17 Bom. 1=19 I. A. 170 (P. C.).

(7) A. I. R. 1916 P. C. 86=40 Mad. 116=44 All. 21=39 I. C. 235 (P. C.).

(8) [1911] 33 All. 400=9 I. C. 753.

away with one hand all that he purports to give with the other. He specifies no objects for the endowment, appoints himself muttawali for life, and quite explicitly covenants that

"I shall during my lifetime spend the profits of the property at my own discretion."

This is bad enough; but what absolutely clinches the matter is that the pious executant reserves to himself "exclusive power to transfer" any of the property ostensibly dedicated. There is a vague suggestion that this will only be done "if I find that it causes loss in any way;" but the learned Maulvi is too careful of his own interest to be satisfied even with this. He goes on to provide in express terms that he is to be at liberty to exercise this power of alienation at his own absolute discretion, "if for some other reason I find it advisable to do so." Here again he makes a half-hearted attempt to keep up the attitude of the pious donor by stipulating that he will "purchase another property in lieu of it and make it part of the property endowed;" but even this limitation of his authority irks him, and he promptly adds that he may also, in the alternative, "spend the consideration for some pious purposes," of the piety of which he is himself of course the sole judge. A document so worded would not operate to transfer ownership in favour of any private individual, and why it should be supposed to do so in favour of the Almighty I cannot imagine. The document is a sham from first to last; it creates no endowment and "dedicates" no property to any purpose whatsoever.

The position is in no way improved by the deed of 10th June 1889. By this time the Maulvi's scheme for a family settlement had been a good deal upset by the death of his only surviving son. The only possible successor he could think of to the office of muttawali which he had reserved to himself under the first deed was the son of his other son, the present defendant, at that time a mere child. He accordingly supplements the deed of 30th January 1885, by nominating this defendant to succeed him as muttawali, by putting him under the guardianship of the present plaintiff and by laying down certain rules for his guidance. He is careful to reiterate the fact that he himself retains full control over the property or his own lifetime, under no obligation

to do anything but spend the money on "proper objects"; but he refers to his will, which he was then engaged in drawing up, for a statement of the purposes on which the income of the endowed property is to be spent hereafter by the muttawali who shall succeed him. He also takes occasion to lay down directions as to what is to become of the property when "no descendant of mine, male or female, is left." I am quite clear that, if no wakf was created by the deed of 1885, none came into existence with the execution of this document on 10th June 1889.

There remains for consideration the will of Maulvi Hahib-ul-lah Khan, a portentous document filling twenty-eight printed pages of our record commenced by him on 1st June 1889, and finally executed on 29th October 1889. The document requires to be considered as a whole. It does undoubtedly make provision for purposes which may fairly be classified as religious or charitable but in its essence it is a family settlement in perpetuity. The mind of the testator is glaringly apparent from the very outset. He is going to provide for his lineal descendants, in the male and female line for ever; so long as one of them is left he is careful to tie up the property against all possibility of waste on their part and to keep it out of the reach of their creditors. What is more he is going to provide them with a steadily increasing property. The present income of the estate which he thus "dedicates" to their advancement he estimates at Rs. 20,000 per annum, adding that with good management he believes that this "can be much increased." He limits the future muttawali rigidly to a certain scale of expenditure; he reckons that after the muttawali has drawn his own comfortable remuneration, paid all the prescribed allowances to other members of the family, met all the household expenses and all the payments on account of charities or religious observances which he has laid down, "the expenses cannot exceed Rs. 10,000 or Rs. 11,000." The handsome (and of course steadily increasing) surplus is to be regularly invested by the muttawali for the benefit of the endowment.

The ingenious old gentleman has even hit upon a plan for stimulating the energies of future muttawalis in the matter. Whatever properties they acquire out of

the annual surplus they may keep one-fourth of the income of the same to themselves, adding it to the prescribed remuneration for their services. The remaining three-fourths however of the income of the newly acquired properties must go to swell the endowment by an ever increasing series of fresh investments. In fact if Maulvi Habib-ul-lah Khan can contrive it, this monstrous estate is to go on growing indefinitely, snowball fashion, the prescribed expenditure on religious and charitable objects bearing an ever-decreasing proportion to the total income and the available surplus for re-investment increasing year by year, and the process is to continue so long as any descendant of the testator, in the male or female line, survives. The possible contingency that the number of his lineal descendants might increase until no adequate provision remained for their maintenance in the "compulsory" and "optional" expenses prescribed by the will does not seem to have been fairly faced by the testator. The one person who would be increasingly well off is the muttawali for the time being, with his remuneration of 25 per cent. of the income of the newly-acquired properties. The object of the entire scheme is to create a perpetuity of the most poisonous kind, under which the endowment is to continue growing like some unwholesome excrescence on the body politic, for the benefit of no one in particular except the muttawali for the time being, but for the honour and glory of the testator and of his family, from amongst whose members the muttawali is always to be chosen.

In the argument before us the parties were divided as to whether the total provision made for expenditure on objects which could by any stretch of language be described as "religious, pious or charitable" amounted to Rs. 1,476 or to Rs. 2,674 per annum. The truth probably lies between the two extremes; but the plaintiff has made up his total by including all the life annuities granted to old servants of the testator, such as any gentleman of position might reasonably and properly desire to make by his will. I should not be disposed to accept a terminable life annuity of this sort as representing expenditure on a "charitable" object in the sense in which the word is used even in the Wakf Validating Act of 1913. Many of the other items of ex-

penditure claimed by the plaintiff as of a "religious" or "charitable" nature amount to no more than the incurring of such expenses as any Mahomedan gentleman of position would expect to meet in connexion with the recurring festivals and observances of his religion. The one really substantial item is the annual expenditure on the upkeep of an Arabic school; and I note that one of the controverted points in the Court below was whether this school had not been compulsorily closed for want of pupils. In any case it seems clear to me that the expenditure prescribed in the will for purposes of a religious and charitable nature was less than 10 per cent. of the testator's estimate of the income of the endowed property, and that this percentage would necessarily be a continually decreasing one if the terms of the will were carried out. We were told in argument that this is just the kind of family settlement which we may expect under Act 6 of 1913. I trust that the common sense of the Mahomedan community will protect them from the creation of many wakfs such as that purporting to be embodied in the document now in question; if not, I can only say that the statute will prove as injurious to the three interests of that community as to those of the country at large.

In any case I feel no hesitation in holding that the will of Maulvi Habibullah Khan, considered apart from the provisions of Act 6 of 1913, does not constitute a valid wakf. The dedication of property to religious or charitable purposes is "unsubstantial and illusory." The real object of the testator is fully apparent from the terms of the document itself; it is "under a colour of piety" to effect "the aggrandisement of his family." I think that even this object is clumsily and somewhat ineffectively carried out, unless the expression above quoted be enlarged so as to read, "the aggrandisement of the family name," but the question of the testator's object requires to be considered apart from the question of the effectiveness of the methods by which he pursued it.

The evidence as to the subsequent conduct of the parties does not seem to me to carry the case much further. When Maulvi Habib-ul-lah Khan died the defendant was still a boy, apparently only about ten years of age. The plaintiff

accordingly took possession of the property believed to be included in the wakf as guardian on behalf of the minor defendant, treating the latter as having succeeded to the muttawaliship. This record does not show what heirs of Habib-ul-lah Khan were in existence whose interests were adversely affected by this arrangement, what was the extent of that gentleman's property which he did not purport to include in the family settlement made by his will, or what was done about this other property. So far as the evidence in this case goes, it would seem that the properties specified in list (b) appended to the plaint, which had devolved on Maulvi Habib-ul-lah Khan subsequently to the month of October 1889, were treated on the same footing as the rest of the alleged trust property though it has had to be conceded in this Court that these properties were never made the subject-matter of any wakf.

Under the terms of the will the plaintiff's guardianship was to continue until the defendant attained the age of 21 ; but the parties took it on themselves to terminate the arrangement about a year earlier by a deed of 31st July 1901. It is worth noticing that under the plaintiff's management the endowed property had been increased in ten years by acquisitions bringing in an additional income of Rs. 5,000 a year. Under the terms of the will the plaintiff was entitled to one-fourth of this income ; but he bargained with the defendant for the transfer to himself in proprietary right of certain landed property taken from out of the new acquisitions. He accepted this transfer in lieu of one-fourth of the income of the newly-acquired properties and of another allowance to which he was entitled under the will. In this transaction both parties seem to have arrogated to themselves a freedom in the matter of dealing with the endowed properties not strictly consistent with the idea of a wakf ; yet they profess in general terms to be acting under the dispositions effected by the will on their common grandfather. I can see nothing in the conduct of the defendant in this connexion by which he can be said to have caused the plaintiff to alter his position to the disadvantage of the latter ; there is therefore nothing to support the plea of estoppel. The defendant

did no doubt enter into the possession of the property ostensibly as muttawali of a wakf ; but neither can it be said that he at any time made any representation to the plaintiff on the subject in consequence of which the latter changed his position to his own disadvantage, nor has either party consistently dealt with the property in suit as held under the alleged trust. The plaintiff had to admit that during his period of management he had incurred expenses (for instance Rs. 10,000 on the wedding of the defendant) not warranted by the terms of their grandfather's will, and the defendant has been raising money by hypothecation of portions of the property in suit in a manner very difficult to reconcile with any honest belief on his part that it had been made the subject of a valid wakf. It has been proved moreover that the largest loan thus raised was arranged with the help of the plaintiff, who signed the mortgage-deed as an attesting witness. On the first two points set down for determination my findings are that there is no estoppel against the defendant, and that no valid wakf was created by any of the deeds executed by Maulvi Habibullah Khan, whether considered singly or in combination.

I am also satisfied that no wakf came into existence with the passing of Act 6 of 1913 in consequence of any retrospective action on the part of that statute. I have already pointed out that a wakf under the Mahomedan law involves a transfer of the ownership of the property which is made the subject-matter of the same ; if the legislature intended to give validity as transfers of property to an unascertained number of past transactions which had no such effect at the time when they were executed, I should have expected it to do so in very clear terms and subject to various conditions and precautions. The utmost that can be said about the terms of the Act as passed is that they involve some ambiguity ; and I find no provision made for the rights of bona fide transferees for value, and no period laid down within which the documents said to be thus validated must be propounded or claims on the same preferred. In examining the statute itself I find nothing decisive on the point in the wording of the preamble, or in the fact that there is no express provision as to the date from

which the act is to come into force. On the other hand the governing words seem to be found at the commencement of S. 3—"It shall be lawful"—and these on the face of them imply a power to be exercised in future from the date of the passing of the Act, and repel the suggestion of retrospective action. A difficulty has been raised regarding the expression "shall be deemed to be invalid" in S. 4; but the Court below is certainly right in saying that this entire section is controlled by the opening words, "no such wakf." It would be unfortunate if the Courts were driven to the conclusion that this one section of this short Act is retrospective, while the rest of the Act is not. I think this contingency can be avoided by interpreting the words "no such wakf" in S. 4 as equivalent to "no wakf hereafter created under the provisions of S. 3." I do not say that this is the only interpretation of which the words are capable; but it seems to me a possible and a fairly reasonable one, and and it makes sense of the Act as a whole.

Such authority as has hitherto come into existence on the point is wholly against the appellant. The question has been touched upon in argument before the Privy Council in the last of the cases on the list given in an earlier part of this judgment (44 I. A. p. 21): *Ramanandan Chettiar v. Vava Levvai Marakayar* (7). It was the respondent in that appeal who stood to win if Act 6 of 1913 has retrospective effect and counsel for the appellant repudiated this contention in advance. As it happened, the respondent had won a case independently of the Validating Act, so the point was not pressed; but the words used by their Lordships in disposing of the appeal do not suggest to my mind that they would have looked favourably on the suggestion that the Act operated so as to validate past transactions. In the following cases the point has been considered and opinions have been expressed against the retrospective action of the statute; *Rahimunnissa Bibi v. Sheik Manik Jan* (9), *Muhammad Buksh Majumdar v. Ajmon Raja* (10) and *Amirbibi v. Azizabibi* (11). In no one of these cases has the particular difficulty been dealt with which has been

pressed upon us with regard to the wording of S. 4 of the Act; and in the second case the opinion expressed on the point now in issue is of the nature of an obiter dictum. At any rate no High Court has yet ventured to interpret the act in the sense desired by the present appellant.

There remains only the contention raised by the respondent as to the bearing on this suit of S. 92, Civil P. C., and this it is not necessary for me to determine now in order to dispose of the appeal. I desire however to say a few words on the point. Some of the arguments addressed to us on behalf of the appellant overlooked the fact that there has been a substantial change in the law since the passing of the present Code of Civil Procedure, Act 5 of 1908. Under the corresponding S. 539 of the former Code there was a certain conflict of authority on the question whether the section had any restrictive effect in respect of any right of suit which might exist independently of its provisions. The addition of Cl. (2), S. 92, Act 5 of 1908 makes it clear that the section is mandatory. A suit claiming any of the reliefs specified must be brought under and in conformity with its provisions, or not at all. If the plaintiff sets up a trust "created for public purposes of a charitable or religious nature," and claims "as a person having an interest in the trust" any of the reliefs specified in the section he must do so in accordance with its terms. One of the objects of the section is that the jurisdiction of our Courts shall not be invoked to control and supervise the administration of public trusts, unless and until a responsible officer of Government has satisfied himself that the matter is one which calls for interference in the public interests. In the present suit the main reliefs sought are those specified in Cls. (a) and (b), S. 92(1) Civil P. C.; the additional relief sought by way of declaration is probably not maintainable at all without a prayer for consequential relief and is in any case the same relief in substance as is specified in Cl. (c), besides being included in Cl. (h) of the same subsection. The present plaintiff therefore could only get round the prohibition laid down in S. 92(2) aforesaid by contending that the religious and charitable purposes of the wakf which he desires to set up are not "public purposes" within the meaning of

(9) [1915] 27 I. C. 96.

(10) [1916] 43 Cal. 158=32 I. C. 701.

(11) A. I. R. 1914 Bom. 109=26 I. C. 906=39 Bom. 563.

the section. An ultimate dedication of property for the benefit of the poor would I take it, certainly be a "public" purpose. Under the Mussalman Wakf Validating Act (6 of 1913) the Mahomedan community has obtained legislative recognition of the claim that under the religious law binding upon a member of that community, he is entitled to settle property in perpetuity on his "family, children or descendants," provided only he keeps up at least the pretence that some purpose of a "public" nature is served by the endowment. I can only ask whether Mahomedan lawyers generally would be prepared, now that Act 6 of 1913 is on the statute book to turn round and say that in a "family wakf" under the said Act the ultimate dedication of the property to public purposes is after all such a mere pretence that trusts or endowments of this nature are not subject to the provisions of S. 92, Civil P. C.

Having said this much, I think it fair to add with reference to the facts of this particular case, that I am far from holding that a suit by the present plaintiff to recover the arrears of the allowance reserved to him under his grandfather's will, and not bargained away by him in the deed of 31st July 1901, would not be maintainable. On the facts at present before us I think the defendant would find it hard to resist such a suit. If he has taken this property, or any of it, under the terms of his grandfather's will, he would seem to have taken it subject to a trust in favour of various persons including the present plaintiff and the liability could be enforced upon a suit properly framed. The present suit has in my opinion been rightly dismissed by the learned Subordinate Judge, and I would dismiss this appeal with costs, including fees on the higher scale.

Walsh, J.—I entirely agree. I very much doubt whether the plaintiff could have maintained this suit in its present form in any case, but the main contention that there was any genuine religious dedication at all has completely broken down. No doubt there are private trusts in the will the breach of which might form the ground for a claim for relief, but this is not the plaintiff's case. Taking the view we do the retrospective operation of the Act of 1913 does not arise for decision, but after hearing the

point fully argued I agree with my brother's opinion about it.

V.B./R K.

Appeal dismissed.

A. I. R. 1918 Allahabad 9

RICHARDS, C. J. AND TUDBALL, J.

Mahmud Ali—Defendant—Applicant.

v.

Tamizunnissa Bibi—Plaintiff—Opposite Party.

Civil Revn. No. 21 of 1918, Decided on 30th July 1918.

Provincial Small Cause Courts Act (1887), Art. 41—Debt paid off by one of several heirs of deceased Mahomedan—Suit to recover share from coheirs is cognizable by Court of Small Causes.

Where one of several heirs of a deceased Mahomedan pays off a debt due by the deceased and then sues his coheirs to recover their share of the debt, the suit is cognizable by a Court of Small Causes and is not excluded from its cognizance by Art 41 of the Act. [P 11 C 1]

S. M. Sulaiman—for Applicant.

S. M. Y. Hasan and *S. A. Haidar*—for Opposite Party.

Order of Reference

Abdul Raoof, J.—This application for revision arises out of a suit brought by Mt. Tamizunnissa against the defendant Mahmud Ali for a certain sum of money. The case as stated by the plaintiff in the plaint was this: One Mahbub Ali died leaving as his heirs Mahbub Ali and Yakub Ali, brothers, Mt. Rasulunnissa, a sister, and Mt. Tamizunnissa, a daughter. On his death he left certain property which was inherited by these heirs according to their shares under the Mahomedan law. At the time of his death he was indebted, and among the creditors there was one Jas Ram who held two pro-notes executed by Mahbub Ali. The plaintiff states that her share under the Mahomedan law in the property left by the ancestor was five sehams. The share of Mahmud Ali and Yakub Ali, the brothers of Mahbub Ali, was two sehams each, and that of Mt. Rasulunnissa, one seham. The plaintiff further states that she paid off the debt due to Jas Ram by executing a bond in favour of the sons of Jas Ram. In para. 3 of the plaint the plaintiff stated that having purchased the shares of Yakub Ali and Mt. Rasulunnissa in the property left by Mahbub Ali, she became the owner of eight sehams and the defendant Mahmud Ali owned two sehams out of the entire property of 10 sehams. It is further stated that the

defendant Mahmud Ali was therefore liable to pay the debts due from Mahbub Ali to the extent of 2 10ths, and it was to recover this 2 10ths of the debt paid off by the plaintiff to the sons of Jas Ram that this suit was filed. The suit was instituted in the Court of the Judge of Small Causes at Bulandshahr. One of the pleas raised in defence by the defendant was that the suit was not cognizable by a Small Cause Court. The defendant relied upon Art. 41, Sch. 2, Provincial Small Cause Courts Act. The Court of first instance, relying upon the ruling in the case of *Roshan Lal v. Ram Lal* (1), disallowed the plea and decided the suit upon the merits and gave a decree in favour of the plaintiff. The present application for revision has been filed against the decree of the Judge of the Small Cause Court. The decree of the Court below is given in these terms :

"The plaintiff's claim for Rs. 101-8-8, the amount in claim, and Rs. 32-14-0, costs of suit, be decreed against the estate of Mahbub Ali Khan, which is in the possession of the defendant."

In the first ground of revision, the defendant-applicant repeats his ground of objection as to the jurisdiction of the Judge of the Small Cause Court, and in the second ground he raises the plea that as the plaintiff in her own plaint asks for a decree against the assets of Mahbub Ali, the suit was not cognizable by the Court of Small Causes. The case has been argued before me at some length on behalf of both the parties and a number of rulings have been cited by the counsel on either side, to which I will refer later on. Dr. Sulaiman who appears for the applicant argues that upon the plaint filed by the plaintiff, it is clear that she based her claim upon the ground that the parties were sharers in a joint property which had come to the heirs of Mahbub Ali as his assets and that therefore they were all liable to pay the debts of Mahbub Ali proportionately according to their shares in the assets left by him. That being the nature of the suit, he argues that the suit was a suit for contribution by a sharer in joint property in respect of payment made by him of money due from a cosharer. On the other hand Mr. Yusuf Hasan has argued that in order to make the article applicable, it ought to be made clear that the payment in respect of which contribution was claimed, was

made on account of the joint property. He also argues that the present suit can hardly be called a suit for contribution. He says the debt due to Jas Ram was not a debt for which the parties may be said to be jointly responsible.

It was not a debt due upon a joint bond or under a joint decree, but it was a debt due against each of the heirs of Mahbub Ali separately on account of his share of liability attaching to him on account of having inherited assets from the common ancestor. It is difficult to decide what Art. 41 contemplates by the words "a suit for contribution by a sharer in joint property." The cases which have been relied upon either side have no direct bearing on the facts of the present case. Mr. Yusuf Hasan has relied upon the case reported as *Bhairan v. Ram Baran* (2), which was a case of joint judgment-debtors; one of the judgment-debtors having paid off the money due on the joint decree sued the others for contribution. He has relied upon the case reported as *Roshan Lal v. Ram Lal* (1), That was also a case of a joint decree. He has also relied upon the case reported as *Bhairon v. Ram Baran* (2). That also was a case of a joint decree against co-judgment-debtors. On the other side Dr. Sulaiman has relied upon the cases reported as *Fatima Bibi v. Hamida Bibi* (3), *Bhatoo Singh v. Ramoo Mahton* (4), *Satya Bhusan Bandopadhyaya v. Krishnakali Bandopadhyaya* (5) and *Rajani Kanta Ghose v. Rama Nath Roy* (6). In the case reported as *Satya Bhusan Bandopadhyaya v. Krishnakali Bandopadhyaya* (5) the plaintiff came on the allegation that he was not liable to make any payment at all, but that he had made a payment for the benefit of the defendant.

It was held in that case that the suit could not be said to be one for contribution at all, and therefore could not come under Art. 41. In *Bhatoo Singh v. Ramoo Mahton* (4) the facts were quite different from those of the present case and the rule there laid down was rather too broad. In the case reported as *Fatima Bibi v. Hamida Bibi* (3) the payment there made was certainly on account of

(2) [1906] 23 All. 292.

(3) A. I. R. 1915 All. 118=23 I. C. 587.

(4) [1896] 23 Cal. 189.

(5) A. I. R. 1915 Cal. 278=24 I. C. 259.

(6) A. I. R. 1915 Cal. 310=27 I. C. 56.

(1) [1907] 4 A. L. J. 543.

the property jointly held by the parties. Joint tenants holding land jointly under a zamindar were held jointly responsible for payment of rent, although they had by private arrangement divided the plots for their separate cultivation and one of the tenants had been made to pay the rent for the entire holding. When he sued for contribution, it was held that the suit came strictly within Art. 41 and it was excepted from the cognizance of the Court of Small Causes also. As I have stated above, none of the cases relied upon by the parties have a direct bearing on the facts of this case. The point raised is of some importance and I think it will be better if it is decided by a larger Bench. I therefore refer this case to a Bench of two Judges.

Judgment.—The main point raised as a ground for revision is that the suit was one which was not cognizable by the Small Cause Court. It is contended that it is excluded by Art. 41 to the schedule to the Small Cause Courts Act. We are satisfied that the suit brought by the plaintiff was not of the nature specified in Art. 41 of the Act. We see no sufficient reason to interfere with the decree of the Small Cause Court in any other matter raised by the memorandum of appeal. We reject the application and make no order as to costs.

V.B./R.K. *Application dismissed.*

A. I. R. 1918 Allahabad 11

ABDUL RAOOF, J.

Makhan Lal Parsottam Dass—Defendant—Applicant.

v.

Chunni Lal Brij Lal—Plaintiff—Opposite Party.

Civil Revn. No. 114 of 1918, Decided on 23rd July 1918, from order of Sm. C. C. Judge, Agra.

Provincial Small Cause Courts Act (1887), S. 25—Decision on question of jurisdiction—No revision lies.

A suit for compensation for breach of contract having been brought in the Court of Small Causes at Agra, a preliminary objection was raised that the alleged breach having taken place at Allahabad, the Court at Agra had no jurisdiction. The Court, after taking evidence, held that it had jurisdiction:

Held: that no revision lay against the order, inasmuch as the case had not been decided on the merits nor had it been "disposed of" within the meaning of S. 25. [P 12 C 1]

Damodar Das—for Applicant.

Narain Prasad Asthana—for Opposite Party.

Judgment.—A preliminary objection is raised on behalf of the opposite party to the hearing of this application. The facts of the case are these: The plaintiff brought a suit in the Court of Small Causes at Agra, claiming compensation for an alleged breach of contract by the defendant. The suit was contested by defendant on two grounds, namely, (1) that the suit was not cognizable by the Small Cause Court at Agra as the alleged breach of contract had taken place at Allahabad: (2) that there was no breach on the part of the defendant and that the suit was not maintainable against him. As regards the first point the learned Judge of the Court below took evidence and came to the conclusion that the suit was rightly instituted in the Court of Small Causes at Agra. It appears that the parties had requested the Court to decide the first point at that stage before taking up the question raised on the second plea in defence. The defendant has filed this application for revision against the decision of the Court below on the question of jurisdiction. Mr. Narain Prasad argues that under S. 25, Provincial Small Causes Courts Act, in order to entitle a party to come up in revision it is necessary that the case must have been decided by the below. That section runs thus:

"The High Court, for the purpose of satisfying itself that a decree or order made in any case decided by a Court of Small Causes was according to law, may call for the case and pass such order with respect thereto as it thinks fit."

The learned vakil who appears for the applicant replies that there has been a decision in the case by the Court below within the meaning of S. 25, and he relies upon two cases, namely, *Ramathan Chetty v. Maruthappa Kone* (1) and *Umesh Chandra v. Rakhal Chandra* (2). The particulars of the latter case are clearly distinguishable from the facts of the present case. In that case what happened was that in a suit filed in a Court of Small Causes a question of title arose on the allegation contained in the plaint and the Court was of opinion with reference to the provisions of S. 23, Act 9 of 1887 that the suit should be tried by a civil Court on the regular side. The plaint was therefore returned for presentation to a regular civil Court. It was against the order returning the plaint

(1) A. I. R. 1915 Mad. 495=25 I. C. 643.

(2) [1911] 10 I. C. 8.

under S. 23 of the aforesaid Act that a revision was applied for and it was argued by the opposite party that as the case had not been decided on the merits, the High Court had no power under S. 25 of the Act to revise the order. It was held by the Calcutta High Court that it was not contemplated by the word "decided" that the case should have been decided on the merits. The learned Judges observed in their judgment as follows:

"We are not prepared as at present advised to put this narrow construction upon the terms of S. 25 nor to adopt the view suggested by the learned vakil, for the opposite party, that the term "decided" in S. 25 means to adjudicate finally on the merits. Besides in so far as the Small Cause Court is concerned the case has been decided."

In the case of *Ramanathan Chetty v. Maruthappa Kone* (1), the learned Judge who decided the case observed:

"Mr. Seshagiri Shastri raises a preliminary objection before me that this petition does not lie under S. 25, Small Causes Courts Act, because there is no "case decided" by the Subordinate Judge sitting on the Small Cause side, and he quoted *Subal Rim Dutt v. Jagadananda Majumdar* (3) for the position that unless there has been a decision on the merits S. 25 has no application. With all respect I am unable to follow this decision. The word "decided" in S. 25 means "disposed of." It does not mean that there must be a decision upon the merits."

In the present instance the case has neither been decided on the merits nor has it been disposed of in any other manner. It is still on the file of the Court awaiting decision. Merely a preliminary issue as to jurisdiction has been decided and the application for revision is made against this decision of the preliminary issue. None of the cases cited are therefore applicable. The preliminary objection must prevail and the application must be rejected. Over and above this, having regard to the circumstances of this case, I do not think that this is a proper case for revision. I accordingly dismiss the application with costs. The stay order is hereby discharged. The record of the case will be sent back to the Court below.

V.B./R.K. *Application dismissed.*

*** A. I. R. 1918 Allahabad 12**

RICHARDS, C. J. AND TUDBALL, J.

Munna Singh—Plaintiff—Appellant.

v.

Ausan Singh and others—Defendants
—Respondents.

First Appeal No. 50 of 1918, Decided on 30th July 1918, from an order of Small Cause Court Judge, Cawnpore.

* Specific Relief Act (1877), S. 9—Decree for possession of land and crops—Crops cut and removed by defendant before execution—Suit for value of crops is maintainable.

Plaintiff obtained a decree under S. 9, for the possession of a piece of land and the crops growing thereon, but before the decree could be executed the defendant cut and removed the crops. Thereupon the plaintiff brought a suit to recover the value of the crops:

Held: that the defendant could not by cutting and removing the crops annul the effect of the possessory decree, and that therefore the plaintiff was entitled to the value of the crops, although the question of title had not been decided in the previous suit. [P 12 C 2]

Peary Lal Banerji—for Appellant.

Narayan Prasad Asthana—for Respondents.

Judgment.—This and the connected appeal arise under the following circumstances: The plaintiff brought a suit against the defendants, alleging that he was in separate possession of certain land situate in a mahal in which both he and the defendants were cosharers; that there was a crop growing on this land which belonged to him and that he had been dispossessed by the defendants. He claimed possession of the land with the crops growing. His suit was under S. 9, Specific Relief Act. The Court finding that the plaintiff was in possession, granted him a decree under that section granting him possession of both the crops and land. Before the decree could be executed, defendants took possession of the crops and cut and removed them. Thereupon the plaintiff brought the suit out of which this and the connected appeal arise. In this he claimed that he was entitled to damages for the crops. It seems to us to make no difference whether he called it damages or asked for the price of the crops which had been taken and removed, as he alleged. The Court of first instance granted the plaintiff a decree, giving him Rs. 396 instead of Rs. 700 odd which he claimed. The first Court was of opinion that it could not go behind the possessory decree given in the previous litigation, and this applied both to the crops and the land.

(3) [1909] 1 I. C. 288.

Both parties appealed; the plaintiff contended that he should have got the amount claimed in respect of the crops, and the defendant that he should not get a decree at all and raising, inter alia, the question of title to the land. The lower appellate Court remanded the case to the Court of first instance, being of opinion that the defendant was entitled to have the question of title tried. We think that this view was entirely wrong. We are clearly of opinion that the defendants could not by cutting and removing the crops annul the effect of the possessory decree. If the defendants are entitled to the land, they should assert that right by proper legal proceedings. It appears that some of the defendants actually did so but did not press their claim. The plaintiff sooner than prolong the litigation is ready to waive his right to have his appeal against the amount decreed him disposed of by the Court below. We have read from the judgment of the Court of first instance the manner in which it arrived at the conclusion as to the value of the crops and we are inclined to think that the first Court took a very moderate view of the amount to which the plaintiff was entitled. We allow the appeal, set aside the order of the Court below and restore the decree of the Court of first instance with costs in all Courts.

V.B./R.K.

Appeal allowed.

A. I. R. 1918 Allahabad 13

RICHARDS, C. J. AND TUDBALL, J.

Hirdey Narain — Judgment-debtor—Appellant.

v.

Alam Singh—Decree-holder—Respondent.

Second Appeal No. 1644 of 1917, Decided on 29th July 1918, from decree of Dist. Judge, Saharanpur.

Pre-emption—Money not paid within time prescribed—Court has no power to extend time—Limitation Act (1908), S. 4—General Clauses Act (1897), S. 10.

Section 4, Lim. Act, and S. 10, General Clauses Act, only apply to the cases in which a period of limitation has been prescribed as mentioned in those sections, and do not apply to a condition prescribed in the decree itself. [P 14 C 1]

A pre-emption decree in its very terms becomes a decree in favour of the defendant vendee when the conditions imposed upon the plaintiff have not been complied with, so that where the decree has become final no Court has power to alter its terms so as to extend the time allowed for payment. [P 18 C 2]

Nehal Chand—for Appellant.

Kailas Nath Katju—for Respondent.

Judgment.—This appeal arises under the following circumstances: The plaintiff in a pre-emption suit obtained a decree for pre-emption on 11th October 1915. By this decree he was directed to lodge in Court the pre-emption money within six months, and it further decreed that in the event of his failing to do so the suit would stand dismissed with costs. It will thus be seen that the decree was a decree in favour of the plaintiff on certain conditions. If those conditions were not fulfilled, the decree became a decree in favour of the defendant vendee. The plaintiff did not deposit the money within six months. The last day which would have enabled the plaintiff to comply with the decree was 11th April 1916. This was a holiday. It was alleged (and it has been found by the Court below) that the money was brought to the nazir on 12th April, a day on which the Court was sitting. On that day he obtained a chalan which would have enabled him to have deposited the money in the Treasury provided the Treasury was sitting. It appears that the Treasury was not open on 12th and was only open for an hour on 13th, and the result was that the deposit was not completed until the 14th. The Court of first instance on an application to execute the decree held that the money had not been deposited in Court within the time specified in the decree. On appeal the lower appellate Court held that the money must be deemed to have been deposited within time, applying (apparently by analogy) S. 4, Lim. Act, and S. 10, General Clauses Act. This Court has held that in the case of a pre-emption decree, which has become final, no Court has any power to alter the terms of the decree so as to extend the time allowed for payment.

It must be remembered that the decree in its very terms becomes a decree in favour of the defendant vendee when the conditions imposed upon the plaintiff have not been complied with. In the present case the plaintiff pre-emptor appears not to have had his money ready until the period of six months had almost expired. In the end it was a money-lender who came with the money accompanied by the plaintiff's agent on 12th April 1916. In our opinion, S. 4, Lim.

Act, and S. 10, General Clauses Act, only apply to cases in which a period of limitation has been prescribed as mentioned in those sections, and do not apply to a condition prescribed in the decree itself. The respondent's learned vakil has referred to the cases of *Sambasiva Chari v. Ramasami Reddi* (1), *Shooshee Bhusan Rudro v. Gobind Chunder Roy* (2) and *Munna Lal v. Radha Kishan* (3). In our opinion none of these authorities apply to the circumstances of the case we have before us. We allow the appeal, set aside the order of the Court below and restore the order of the Court of first instance with costs in all Courts.

V.B./R.K. *Appeal allowed.*

(1) [1899] 22 Mad. 179.

(2) [1891] 18 Cal. 231.

(3) A. I. R. 1915 All. 414=30 I. C. 186=37 All. 591.

A. I. R. 1918 Allahabad 14

ABDUR RAOOF, J.

Jumna Prasad — Defendant—Applicant.

v.

Karan Singh and others—Plaintiffs—Opposite Parties.

Civil Revn. No. 27 of 1918, Decided on 14th June 1918, from an order of Dist. Judge, Aligarh, D/- 4th December 1917.

Civil P. C. (1908), S. 115—Matters under Agra Tenancy Act—High Court has no revisional powers—Agra Tenancy Act (2 of 1901), S. 167.

In matters coming under the Agra Tenancy Act the power of revision has not been given to the High Court : 2 I. C. 377, *Foll.* [P 15 C 1]

Lakshmi Narayan—for Applicant.

Surendra Nath Sen—for Opposite Parties.

Judgment.—This was a suit brought under Ss. 58-63, Act 2 of 1901 for ejectment. One of the pleas raised in the Court of first instance was that the relation of landlord and tenant did not subsist between the plaintiff and the defendant. There was also a plea that this suit for ejectment of the tenant was not cognizable by the Revenue Court. The Court of first instance, the Assistant Collector, went into the question of the relation of landlord and tenant between the parties, fully examined the whole of the evidence given in the case and came to the conclusion that there was a relation of landlord and tenant between the parties. On the plea of jurisdiction the Court found that as it had already come

to the conclusion that there was a relation of landlord and tenant between the parties, the question of jurisdiction was also involved in that issue and that the suit was cognizable by the Revenue Court. That Court decreed the suit. From the decree and judgment of the Assistant Collector an appeal was filed by Jumna Prasad, and one of the grounds taken in the memorandum of appeal before that Court was that the lower Court had erred in law and fact in determining issues 3, 4 and 5. It did not record a finding on the point whether the suit was cognizable by the Revenue Court or not.

When the appeal came up for decision before the learned District Judge, he was of opinion that there was no decision on proprietary right and that there was no decision on the question of jurisdiction, as the appellant before him himself had complained in the memorandum of appeal that the Court of first instance had not decided the question of jurisdiction. He therefore held that no appeal lay to him and ordered that the petition of appeal should be returned to the appellant. From the order of the District Judge the present application for revision has been filed. Dr. Sen, who appears for the opposite party has raised a preliminary objection to the hearing of this application and has argued that in matters coming under the Tenancy Act the power of revision has not been given to this High Court. He has relied upon the decision reported in the case of *Thakur Damber Singh v. Sri Kishun Das* (1) and also upon the judgment of Piggott, J., in the case of *Parbhu Narain Singh v. Harbans Lal* (2). Mr. Lakshmi Narain argues in reply that this case is clearly distinguishable from the case of *Thakur Damber Singh v. Sri Kishun Das* (1) because in this case a decision upon a revenue matter was challenged by way of revision in this Court and therefore having regard to the provisions of S. 167, Tenancy Act, no revision could lie in that case; but whereas in this case the sole question raised is that the learned District Judge was wrong in refusing to entertain the appeal a revision would lie, because in such a case the matter in dispute would not be brought forward and questioned on the merits. He also

(1) [1909] 31 All 445=2 I.C. 377.

(2) [1916] 35 I. C. 279.

relies upon the judgment of Walsh, J., in the case of *Parbhu Narain Singh v. Harbans Lal* (2). I have heard the arguments on both sides but I do not see any ground to distinguish this case from the case of *Thakur Damber Singh v. Sri Kishun Das* (1). Having regard to the construction which the learned Judges put upon the provisions of S. 167, Tenancy Act, I do not think there is any room for argument that power of revision to the High Court was given under the Tenancy Act. In this view I am bound to hold that the present application for revision does not lie. I therefore dismiss it with costs.

V.B./R.K. *Application dismissed.*

A. I. R. 1918 Allahabad 15

TUDBALL AND ABDUR RAOOF, JJ.

Mt. Ganga—Defendant—Appellant.

v.

Kanhai Lal and others—Plaintiffs—Respondents.

Second Appeal No. 1247 of 1916, Decided on 1st July 1918, from a decree of Dist. Judge, Aligarh, D/- 29th May 1916.

Hindu Law—Widow—Possession by trespasser during lifetime of widow is not adverse against reversioners.

Possession taken by a trespasser during the lifetime of a Hindu widow or Hindu female with a life-interest is not adverse as against the reversioners until after the death of the widow.

[P 16 C 1]

Panna Lal—for Appellant.

Nihal Chand Vaish—for Respondents.

Judgment.—This is a defendant's appeal. The facts of the case are not in dispute. One Tika Ram was the owner of the property in respect of which this suit has been brought. He had a wife Mt. Jhunja, two sons and two daughters. His two sons predeceased him and one of them left a widow Mt. Ganga. Tika Ram died and his wife Mt. Jhunja survived him. She died some 16 years before the present suit was brought. On her death two daughters Mt. Dhanno and Mt. Jethi were in law entitled to take the property. However Mt. Ganga took possession and obtained mutation of names in her own favour and admittedly has been in possession ever since. Neither Mt. Dhanno nor Mt. Jethi apparently opposed her. Mt. Jethi died some eight years before suit leaving the three plaintiffs, her sons. Mt. Dhanno is still alive. On 6th April 1915, Mt. Ganga made a will, bequeathing this property, as if it

were her own, to the defendants Khachar Mal and Cheda Lal. The plaintiffs have brought the present suit. They allege collusion between Mt. Dhanno and Mt. Ganga. They pointed out that Mt. Dhanno had allowed Mt. Ganga to acquire title by prescription as against her Mt. Dhanno. They claimed that they were entitled to take possession on behalf of Mt. Dhanno and to manage for her. They sought not only to recover possession of the property, but they also asked for a declaration which is relief A in their plaint. That runs as follows :

"On establishment of the plaintiffs' right it may be declared that the name of the defendant first party stands recorded against the property given below without any right, and that she has no adverse or proprietary right to the property aforesaid, nor has she any right to make the will dated 6th April 1915."

The Court of first instance dismissed the suit. The lower appellate Court held that the plaintiffs were entitled to a declaration that they are the owners of the property in suit as from the death of Mt. Dhanno and that as against them, Mt. Ganga's possession is not and cannot become adverse or proprietary and the will of 6th April 1915 made by her is void and unenforceable. An examination of the lower appellate Court's decree will show that this was not the declaration which was actually granted in the decree. In that decree it was declared that the plaintiffs have been in possession of the property in dispute since Mt. Dhanno's death (a fact that nobody has asserted at any time, Mt. Dhanno being still alive,) secondly, that the possession of Mt. Ganga neither is nor can be adverse or proprietary as against the plaintiffs, and that the will dated 6th April 1915 executed by Mt. Ganga is void and ineffectual. This is followed by an order that Mt. Ganga should bear her own costs. This decree has been signed by the Judge and the pleaders for the parties as well as by the Munsarim of the Court below. It is quite clear on the facts that the plaintiffs ought not in these circumstances to receive any declaration whatsoever. It is an absurdity to declare that the plaintiffs will be the owners of the property after the death of Mt. Dhanno. It is impossible to credit that they will be alive at the time of her death, and no such declaration can or ought to be granted. As regards the declaration that Mt. Ganga's possession is not and cannot

become adverse as against the plaintiffs, there is no need for any such declaration at all. It is a question of law, which has been repeatedly decided that possession taken by a trespasser during the lifetime of a Hindu widow or Hindu female with a life-interest is not adverse as against the reversioners until after the death of the widow; but the Courts in this country do not grant declarations on points of law simply for the convenience of parties. Thirdly, as regards the will executed by Mt. Ganga, the declaration in respect of it is a declaration which ought not to be granted. We would refer to the decision in the case of *Umrao Kunwar v. Badri* (1) and also to the remarks of their Lordships of the Privy Council in the case of *Jaipal Kunwar v. Indar Bahadur Singh* (2). We do not think it is necessary on this branch of the case to make any further observations. It is obvious that the declaration which the Court below sought to grant, ought not to be given any more than the absurd declaration which was entered in the decree. We allow the appeal, set aside the decree of the Court below and restore that of the Court of first instance. The appellant will have his costs in all Courts.

V.B./R.K. *Appeal allowed.*

- (1) A. I. R. 1915 All. 252=29 I.C. 302=37 All. 422.
 (2) [1904] 26 All. 238=31 I. A. 67=7 O. C. 239 (P. C.).

A. I. R. 1918 Allahabad 16

RICHARDS, C. J. AND TUDBALL, J.

Municipal Board of Benares—Defendants—Appellants.

v.

Gajadhar—Plaintiff—Respondent.

First Appeal No. 58 of 1918, Decided on 3rd August 1918, from order of Addl. Sub-Judge, Benares.

U. P. Municipalities Act (1916), S. 326—Suit against Municipality for declaration that platform is ancestral property and for injunction—Suit is in substance one for declaration of title—Exemption in S. 326, Cl. (4) is not applicable—Suit commencing before expiry of two months after service of notice under S. 326 (1) is premature.

The defendant Municipality served a notice on the plaintiff, on 17th June 1916, requiring him to remove a platform which projected on to a public road. Plaintiff served a notice of action on the Municipality on 14th July 1916, and on 4th August instituted a suit against the Municipality for a declaration that the platform was his an-

cestral property, and that the notice issued by the Municipality for the demolition thereof was invalid, and also prayed for an injunction:

Held: (1) that the suit was in substance one for a declaration of title and was not a suit in which the only relief claimed was an injunction and that therefore the exemption contained in Cl. (4), S. 326 was not applicable to it;

(2) that the suit having been commenced before the expiry of two months after the service of the notice prescribed by S. 326 (1), was premature and must be dismissed. [P 16 C 2; P 17 C 1]

Gokul Prasad—for Appellants.

Sailanath Mukarji—for Respondent.

Richards, C. J.—This appeal arises out of a suit brought by the plaintiff against the Municipal Board. Later on we shall refer to the relief the plaintiff claimed before and after the amendment of the plaint. The dispute between the parties commenced by an application for leave to build or re-build a chabutra and saiban. The Municipality refused leave and there were various negotiations between the parties to which it is unnecessary for us to refer, except to say that no final agreement was arrived at between the parties. If a map which is on the record correctly describes the premises, it would appear that the chabutra projects on to a public road. All orders made by the Municipality on these applications for leave to build and re-build are subject to appeal as mentioned in the Municipalities Act of 1916 and they cannot be challenged in any other Court. Accordingly, if the plaintiff's cause of action has anything to do with the orders which the Municipality made upon the application of the plaintiff, he has no cause of action. It has been suggested on behalf of the plaintiff that the structure is very old. Even if this be true, the Municipal Board under S. 211 of the Act have power to require the owner to remove the structure if it overhangs, projects or encroaches on a street or into or upon any drain, sewer or aqueduct therein. The present suit seems to have been founded on a notice which the Municipal Board caused to be served requiring the plaintiff to remove the chabutra. This notice was served on 17th June 1916. S. 326 of the Act provides that no suit shall be instituted against a Board in respect of any act done until after the expiration of two months after the notice prescribed in that section has been served. Now the Act of the Municipality which gave rise to the present cause of action was the notice which they caused to be

served in June 1916. Admittedly the notice of action served by the plaintiff was on 14th July 1916, and the suit was commenced on 4th August of the same year, that is, admittedly less than two months after the notice of action had been given. It would seem therefore that *prima facie* the plaintiff's suit was premature.

As it originally stood it was clearly a suit for a declaration to establish the plaintiff's title to the land, and ancillary thereto an injunction. In order to avoid the consequence of the want of the prescribed notice under the Act, the plaintiff amended his plaint, but only in respect of the relief asked for. His amendment is in reality an amendment in language only not in substance; he still asks for a declaration that the platform and the saiban is ancestral property of the plaintiff and that the plaintiff and his ancestors have been for a long time in possession and occupation thereof, that the Municipal Board has no right to get the same demolished and that according to law the notice issued by the Municipal Board regarding the demolition thereof is invalid and void, and then he prays that an injunction may be issued. The only exception to the provision requiring notice of action is to be found in Cl. 4, S. 326, which is as follows:

"Provided that nothing in sub-S. (1) shall be construed to apply to a suit wherein the only relief claimed is an injunction of which the object would be defeated by the giving of the notice or the postponement of the commencement of the suit or proceeding."

Even after the amendment the suit is not a suit in which the only relief claimed is an injunction. Furthermore, from the very nature of the suit and the allegations made by the plaintiff and defendant respectively, it is absolutely clear that the object of the suit would not be defeated either by the giving of the notice or the postponement of the commencement of the suit. The real substance of the suit is the title to the land. Even if the Municipal Board had carried out their alleged threat to demolish the building as it stands, it could very easily be restored after the plaintiff had established his title. The total value placed upon the chabutra is the sum of Rs. 25. We think that the decree of the Court of first instance is correct and should be restored. We allow the appeal, set aside the order of the lower appellate Court and restore

the decree of the Court of first instance with costs in both Courts.

V.B./R.K.

Appeal allowed.

A. I. R. 1918 Allahabad 17

PIGGOTT, J.

Mahadeo Singh and others — Accused
— Applicants.

v.

Emperor — Opposite Party.

Criminal Revn. No. 446 of 1918, Decided on 8th August 1918.

Defence of India Act (1915), S. 2 — Rules under Act, Rr. 23 and 29 — *M*, tenant of accused, being recruited in army — Accused suing *M* for arrears of rent — *M* appearing before District Magistrate and making statement which was neither on oath nor signed — District Magistrate charging accused with having contravened R. 23 and convicting him — Procedure followed is irregular — As alleged charges occurred after *M* had joined army R. 23 did not apply — Criminal P. C. (1898), Ss. 191 and 200.

In view of the exceptional powers conferred upon the authorities by the Defence of India Act and by the rules framed under it, the Courts are entitled to require strict compliance with all the provisions introduced into the rules by way of safeguarding the liberty of the subject.

[P 18 C 2]

M, a tenant of the accused, was recruited in the army and received a certain sum in advance. About a month afterwards the accused brought a suit against *M* for arrears of rent. *M* appeared before the District Magistrate and made a statement which was neither made on oath nor signed. The District Magistrate thereupon directed warrants without bail to issue for the arrest of the accused and took up the case himself. The accused were charged with having contravened R. 23 of the rules framed under the Defence of India Act and were convicted and sentenced under R. 29:

Held: (1) that the proceedings in the Court of the District Magistrate were irregular in their initiation, inasmuch as the Magistrate, if he conceived himself to be taking cognizance of the offence upon information received from *M* within the meaning of S. 190 (c), Criminal P. C., was bound to offer the accused the option of being tried by another Court as provided by S. 191 of the Code and if he treated the statement made by *M* as the complaint in the case, was bound before issuing warrants to take from *M* a sworn declaration that he had spoken the truth and to obtain the signature of *M* to that declaration: (2) that the facts alleged in the charge having occurred after *M* had joined the army, R. 23 of the rules framed under the Defence of India Act was not applicable to the case, inasmuch as a person cannot be said to dissuade or to attempt to dissuade another from doing something which the latter has already done. [P 18 C 1, 2]

A. P. Dube — for Applicants.

R. Malcomson — for the Crown.

Judgment. — In this case Mahadeo Singh, Mahabir Singh, Harnarain Singh and Dipnarain Singh, Thakurs, residents

of Jhingurpatti in the District of Mirzapur, have been sentenced by the District Magistrate of Mirzapur to undergo imprisonment for a period of 20 months each under R. 29 of the rules framed under S. 2, Defence of India Act 4 of 1915. The rule which they are alleged to have contravened is No. 23, which runs as follows:

"No person shall dissuade, or attempt to dissuade, any person from entering the military or police service of His Majesty."

The facts of the case, which I find to be established beyond question are that Musai Pasi of Jhingurpatti is a subtenant of two of the accused persons, namely, Mahadeo Singh and Harnarain Singh, and that he has also worked as a ploughman for all the accused. On 4th March 1918 Musai was recruited in the Bandel Corps for service in Mesopotamia and received an advance of Rs. 25. On 2nd April 1918, Mahadeo Singh and Harnarain Singh sued Musai, as their subtenant, for arrears of rent for the year 1324 Fasli, amounting to Rs. 30-15-0 plus interest. On 8th April 1918, Musai, having previously made some statement to the Recruiting Officer, Mr. Branford, appeared before the District Magistrate of Mirzapur. The record of this case commences with a statement recorded in English by the District Magistrate as made to him by Musai on that date. The statement is not made on oath and is not signed by Musai. Then follows an order in the District Magistrate's hand, and signed by him, directing warrants without bail to issue for the arrest of these four accused persons and an order for the summoning of certain witnesses. The District Magistrate took up the case himself on 22nd April 1918. He framed a charge on 13th May and he convicted and sentenced the accused on 15th May, after having heard their defence witnesses. The conviction and sentence have been affirmed by the Additional Sessions Judge on appeal and the matter has been brought before this Court in the exercise of its revisional jurisdiction.

The proceedings in the Court of the District Magistrate were certainly irregular in their initiation. If the Magistrate conceived himself to be taking cognizance of this offence upon information received from Musai within the meaning of S. 190 (c), Criminal P. C., he was

bound to offer the accused persons the option of being tried by another Court, as provided by S. 191 of the same Code. If, on the other hand, the statement of Musai with which this record opens is the complaint in the case, upon which the District Magistrate proceeded to take cognizance, he was bound before issuing warrants, to take from Musai a sworn declaration that he had spoken the truth in the complaint made by him and to have obtained the signature of Musai to that sworn declaration. A further question has been raised as to the application in this case of R. 30 of the rules in question. In view of the exceptional powers conferred upon the authorities by the statute, and by the rules under consideration, "I think that the Courts are entitled to require strict compliance with all the provisions introduced into the rules by way of safeguarding the liberty of the subject. The District Magistrate ought, strictly speaking, as soon as he decided that action was called for on the information which Musai had given, to have recorded a formal proceeding, intimating his opinion that the initiation of a prosecution against the persons implicated in Musai's statement was advisable. If he had done this, and had also made up his mind definitely whether he was taking cognizance of the matter upon a complaint, or merely upon information received he would probably have gone on to consider whether the interests of justice required that he should try the case himself. I do not say that I should necessarily have interfered in this matter if I had no other exception to take to the proceedings in the Courts below than the irregularity of their initiation.

As a matter of fact however it seems to me that these proceedings have been misconceived in essential particulars. The rule under which the applicants have been convicted is not the rule applicable to the facts stated in the charge. Musai had enlisted, that is to say, had entered the military service of His Majesty, on 4th March 1918, and all the facts alleged in the charge are subsequent to that date. It is contrary to the genius of the English language to hold that one person can "dissuade or attempt to dissuade" another from doing something which the latter has already done. It is arguable that the Courts below might have acted, or may

have conceived themselves to be acting, upon a statement made by Musai, to the effect that threats had been addressed to him prior to his enlistment with a view to dissuading him from taking that course. It also seems to have been present to the mind of the District Magistrate, and of the Additional Sessions Judge, that the accused might be liable to conviction on the ground that they had dealt with Musai in a certain manner with the object, not of dissuading Musai himself from enlisting, but of discouraging other persons from following his example. Finally, it may be argued that the accused specified in the charge might under circumstances be held punishable under R. 24, though not under R. 23, if the Court were satisfied that they had attempted to induce Musai to fail in his duty as a person in the military service of His Majesty by refusing to fulfil the engagement which he had taken upon himself at his enlistment. I mention these points to show that they have been considered by me before disposing of the case; but I think it sufficient to say that if the accused had been tried on charges suggested by any one of the three lines of argument above set forth, not only would the charge have required to be differently framed, but also the prosecution would have been faced with other and serious difficulties before any Court could have felt justified in holding the suggested offences, or any of them, proved by the evidence on the record.

It has, of course, been necessary for me to subject the entire record to a careful examination before I could form any final opinion about the merits of this application. I cannot help remarking that in the reasoning which has satisfied both the Courts below that the evidence on the record, which is certainly scanty and is admittedly discrepant in some important particulars, was sufficient to prove certain facts against the accused persons, there seems to me one fairly obvious and somewhat serious flaw. Most of the points suggested in favour of the accused persons have been put aside in the Courts below, with the remark that there seems no adequate motive for Musai in bringing this accusation if it is not true, or at least founded on fact. I take it on myself to suggest that a very possible explanation of all the evidence on the record, and one which meets most of the

difficulties suggested on both sides, would be that Mahadeo Singh and Harnarain Singh thought themselves justified in bringing pressure to bear upon Musai to pay up his arrears of rent before he left the country, and that Musai strongly resented their doing so. There is only one other point on which I think it fair to say a word or two. Both the Courts below have taken it to be proved that the four accused persons first succeeded in obtaining by threats of violence from Musai's wife a sum of Rs. 25 on account of the arrears of rent due to them, and that subsequently Mahadeo Singh and Harnarain Singh sued Musai for arrears of rent without giving him any credit for this payment of Rs. 25. If this were proved by the evidence, the accused or at least Mahadeo Singh and Harnarain Singh, would deserve to be prosecuted for an offence punishable under S. 209, I. P. C., and it might be my duty to go further into the matter from this point of view. It seems to me however that the evidence on which the Courts below have found that Musai's wife actually handed over Rs. 25 to the accused persons is of the slenderest, and I have ascertained, by going a little outside the record, a fact which the accused persons should have taken the trouble to have brought upon this record, namely, that Musai did not defend the suit for arrears of rent and made no attempt to prove that the major portion of the claim had been satisfied by a payment of Rs. 25 obtained by Mahadeo Singh and Harnarain Singh from his wife.

In my opinion therefore it is useless to pursue this matter further. The conduct of the accused persons was not particularly creditable to them, and may have been worse than anything that appears to be clearly proved by the record, but they have undergone very nearly three months' rigorous imprisonment in consequence, and the District Magistrate may perhaps feel that, whatever order this Court may now pass, the proceedings instituted by him have served a useful purpose. I do not wish to say anything to deprive him of that satisfaction. On the contrary, I think it fair to say that I fully recognize the fact that he acted in all good faith in the public interests. The conclusion I come to is that the four applicants have been convicted on a charge which is not supported by the

evidence on the record and which is in fact bad in law, inasmuch as the facts alleged therein did not amount to an offence punishable under the rule therein quoted. Any further examination which I have made of the record and any further comments which I have passed on the evidence, are merely directed towards the question of the propriety or otherwise of ordering further proceedings to be taken after setting aside this conviction. The remarks which I have made are, I think, sufficient to explain my reasons for contenting myself with quashing these proceedings, without passing any further order. The result is that I set aside the conviction and sentence in this case, acquit the four applicants of the offence charged, and direct that they be forthwith released.

V.B./R.K. *Application allowed.*

A. I. R. 1918 Allahabad 20

RICHARDS, C. J. AND TUDBALL, J.

Nanhey Mal—Defendant—Appellant.

v.

Chait Ram and *another*—Plaintiffs—Respondents.

Second Appeal No. 1415 of 1916, Decided on 20th July 1918, from decree of Offg. Sub-Judge, Farrukhabad.

Negotiable Instruments Act (1881), Ss. 64 and 76—Bill of exchange—Payee endorsing to plaintiff—Plaintiff suing drawer and drawee without presenting bill to drawee either for acceptance or payment—Drawer found to have drawn bill against goods supplied to drawee—Neither drawer nor drawee held liable on bill.

The payee of a bill of exchange endorsed it to the plaintiff and subsequently became insolvent. The plaintiff sued the drawer and drawee of the bill without having presented the bill to the latter either for acceptance or for payment. It was found that the drawer had drawn the bill against goods supplied to the drawee:

Held: (1) that no presentment having been made the drawee was not liable on the bill at all; (2) that the onus of showing that the drawer could not suffer damage from want of presentment lay on the plaintiff; (3) that the drawer having supplied goods to the drawee as the value of the bill of exchange it must be presumed that he had suffered damage from want of presentment and that therefore he too was not liable on the bill. [P 21 C 1]

Surendra Nath Sen—for Appellant.

Tej Bahadur Sapru—for Respondents.

Judgment.—This appeal arises out of a suit instituted on foot of a hundi. It appears that the appellant *Nanhey Mal* sent certain potatoes to *Hari Kishore* a firm in Calcutta. *Nanhey Mal* drew a bill payable at sight on *Hari Kishore*

at Calcutta. The bill was in favour of *Mathra Das Mohan Lal*, who sold it the very same day to the plaintiffs, that is, on 2nd April 1913. The plaintiffs sent the hundi in an unregistered letter to their agent at Cawnpur. The letter and the bill appear to have miscarried in the post, but owing to the carelessness of the plaintiffs the loss was not discovered for nearly 14 months afterwards. Some negotiations proceeded between the plaintiffs and *Nanhey Mal* with a view to getting a duplicate. Exactly what form those negotiations took is not clear, but it would seem that if the plaintiffs had given satisfactory evidence of the loss and had offered an indemnity to *Nanhey Mal* the latter might have been compelled by proper proceedings to give a duplicate. No such proceedings were in fact ever taken; but the present suit was instituted on 14th April 1915. *Hari Kishore* was made a party as also was *Nanhey Mal*. Admittedly the bill of exchange was never presented either for acceptance or payment to *Hari Kishore* nor apparently was even a demand made from the latter. The Court of first instance dismissed the suit as against *Hari Kishore* but gave a decree as against *Nanhey Mal*. The lower appellate Court confirmed the decree. *Nanhey Mal* appeals. The other persons who were parties to the appeal in the Court below are not parties to this appeal. The question is whether *Nanhey Mal* is liable under the circumstances. S. 64, Negotiable Instruments Act, provides that a bill of exchange must be presented for payment in the manner mentioned in that and subsequent sections. S. 76 provides that no presentment for payment is necessary in certain circumstances. The section says:

“No presentment for payment is necessary and the instrument is dishonoured at the due date for presentment, in any of the following circumstances.”

Clause (d), says
“as against a drawer if the drawer could not suffer damage from want of such presentment.”

This Court has held that the onus of showing that the drawer could not suffer damage from want of presentment lies on the holder suing on the bill. Admittedly in the present case no such proof was given. As a matter of fact in the present case *Hari Kishore* received potatoes from *Nanhey Mal* for the hundi; in other words, it was the way in which

Hari Kishore was paying for the potatoes. It is quite impossible to say under these circumstances that Nanhey Mal could not have suffered damage by reason of the nonpresentation for payment of the bill to Hari Kishore. The person in whose favour this bill was drawn has gone bankrupt and a similar fate conceivably might have happened to Hari Kishore. We allow the appeal, set aside the decrees of both the Courts below and dismiss the suit as against the appellant with costs in all Courts.

V.B./R.K. *Appeal allowed.*

A. I. R. 1918 Allahabad 21 (1)

PIGGOTT AND WALSH, JJ.

Ali Raza—Plaintiff—Appellant.

v.

Sanwal Das and others—Defendants—Respondents.

First Appeal No. 146 of 1916, Decided on 15th June 1918, from decree of Sub-Judge, Jaunpur.

Mahomedan Law—Wakf—Creation of—Trust-deed not divesting settlor of ownership does not constitute wakf.

A trust deed executed by a Shia Mahomedan and his wife contained a recital to the effect that the eldest son of the settlors had already been entrusted with the management of the landed properties belonging to the executants and that this management was to continue under the deed. The document also contained provisions as to what was to happen on the death of the executants, but none of those provisions operated so as to divest the executants of their ownership in the trust properties from the date of the execution of the deed:

Held: that the document was insufficient to create a valid wakf. [P 21 C 2]

S. M. Sulaiman and S. A. Haider—for Appellant.

Surendra Nath Sen and Gokul Prasad—for Respondents.

Judgment.—The question in issue in this appeal, as it was in the Court below, is whether a valid wakf is created by a certain supurdnama, or trust-deed, of 27th December, 1863, executed by a Shia gentleman of the name of Syed Maqsd Ali Khan and his wife Alwah Bibi. We have been taken through the document in question. It does not divest the executants in praesenti of their ownership or power of alienation in respect of the property therein dealt with. It is true that it contains a recital to the effect that Syed Moazzam Ali, the eldest son of Syed Maqsd Ali Khan, has already been entrusted with the management of the landed properties belonging to the

executants and that this management is to continue under the deed. But a mere power of management may be revoked at any time by the owners of the property. The document also contains provisions as to what is to happen on the death of the executants, but those provisions do not operate so as to divest the executants of their ownership from the date of execution of the deed. The other points taken in the memorandum of appeal are covered by the authorities relied on by the trial Court: *Murtazi Bibi v. Jumna Bibi* (1) and *Hamid Ali v. Mujawar Husain Khan* (2). It is true that a certain portion of the reasoning on which the decision of the learned Chief Justice of this Court in the latter of these two cases proceeds is invalidated by a subsequent decision of their Lordships of the Privy Council in *Bagar Ali Khan v. Anjuman Ara Begam* (3), by which the right of a Shia to create a wakf by will was recognised assuming, of course, that the testamentary disposition of the property amounted in other respects to a valid wakf under the Mahomedan law. This however does not seriously affect the weight of the decisions above referred to.

We do not feel at all disposed to reconsider at this time of day the question of law disposed of by the two decisions above referred to. The effect of the Mussalman Wakf Validating Act of 1913 can be considered hereafter, when the Court has before it a document executed in virtue of the power recognized by that enactment. We are content to say that, so far as this appeal is concerned, the pleas taken in the memorandum of appeal either depend upon the construction of the deed of 1863, on which point our decision is against the appellant, or are concluded by authorities of this Court which we are in no way disposed to reconsider. We therefore dismiss the appeal with costs.

V.B./R.K.

Appeal dismissed.

(1) [1891] 13 All. 261.

(2) [1902] 24 All. 257.

(3) [1903] 25 All. 236=30 I. A. 94 (P. C).

A. I. R. 1918 Allahabad 21 (2)

RICHARDS, C. J. AND BANERJI, J.

Mannulal and another—Appellants.

v.

Nelin Kumar Mukerji—Respondent.

First Appeal No. 370 of 1915, Decided on 23rd October 1918.

Provincial Insolvency Act (3 of 1907), S. 42—Suit instituted by receiver is maintainable after annulment of adjudication.

A suit instituted by the receiver of the estate of an insolvent against a debtor of the insolvent during the pendency of the insolvency proceedings is not rendered unmaintainable on the annulment of the adjudication. [P 22 C 1, 2]

B. E. O'Connor and *Surendra Nath Sen*—for Appellants.

Motilal Nehru and *Sital Prasad Ghosh*—for Respondent.

Judgment.—The facts out of which this and the connected appeals arise are somewhat complicated but it is unnecessary to state them at any great length. It appears that there were three brothers Ghasi Ram, Shankar Lal and Mannu Lal. There was also their father Fauji Lal. Ghasi Ram appears to have been a man of considerable business capacity and intelligence and to have started a number of businesses in various parts of the province, which were up to a certain period at least quite successful. He associated his father and brothers as partners in some of the concerns without any contribution of capital on their part. All went well until one of the brothers Mannu Lal started a suit for partition against his brother Ghasi Ram. Ghasi Ram, instead of meeting this suit in a straightforward fashion and having all questions decided between himself, Mannu Lal and the other members of the family, got himself declared an insolvent. After a good deal of litigation (out of which probably the legal profession alone gained anything), a scheme for composition was put forward and eventually accepted by the creditors and the Court. The bankruptcy was annulled. Before this happened however a suit had been commenced by the receivers against Shankar Lal and Mannu Lal in respect of their alleged liability, as partners in some of the concerns to Ghasi Ram and his son as the proprietors of certain other concerns in which Shankar Lal and Mannu Lal had no interest. Notwithstanding the fact that the declaration of insolvency was annulled the present suit was continued and the learned Subordinate Judge has made a decree in favour of the receivers, plaintiffs in the suit.

The first point argued on behalf of Shankar Lal and Mannu Lal (the latter being represented by Mr. O'Connor, Barrister, and the former by Mr. Katju) was that the annulment of the insolvency

rendered the suit by the receivers unmaintainable and that on this ground alone the suit ought to have been dismissed. In our opinion this contention has no force. The defendants are alleged to be the debtors of Ghasi Ram and the other late insolvents. Ghasi Ram makes no objection to the suit being maintained (the objection that is raised is at the instance of the alleged debtors). There can be no doubt that the suit was properly instituted originally. There can be no doubt the suit could have been continued after the annulment in the name of the late insolvents if not by the receivers. It seems perfectly clear that if the debtors pay the amount found due either voluntarily or under stress of a decree they will get a good discharge for their indebtedness to the late insolvents. We think under the circumstances that no injustice of any kind could be done to the defendants by the case being heard out on the merits. The next point argued was that the suit should have been dismissed because the suit as framed did not ask for an account of the transactions relating to a number of other concerns in which the parties were interested. Such pleas were raised in the Court below on behalf of the defendants and the Court admitted the equity of the defence by directing that the account should be taken in such a way that the liability if any of the defendants would be finally decided after giving them credit for any sums which might be due to them from Ghasi Ram on account of the other concerns. We think that having taken care to prevent the possibility of any injustice being done to the defendants on account of original frame of the suit the Court below was quite right in not dismissing the suit but directing that the accounts should be taken.

The next point that was urged was that the Court below has assumed the correctness of the claim for Rupees 13,538-3-0 being due to the Cawnpore firm. It was contended that the Court ought not to have assumed that this sum was actually due but should have gone further into the accounts and it was vaguely hinted that fictitious entries might have been made by Ghasi Ram in the Lakhimpur and Gola accounts at the time the suit was brought for partition by Mannu Lal so as to inflate the indebt-

edness of these two concerns to the Cawnpore firm. It was urged that the learned Judge himself thought that there were fictitious entries in these accounts. We have carefully considered the point and we cannot see that the learned Judge thought anything of the kind. We have even seen the evidence that was given on this particular point. One item that was suggested as a fictitious entry was a sum of Rs. 1,300 or thereabouts, damages which the Cawnpore house had paid to Ralli Brothers and had charged against Lakhimpur. It appears that witnesses were examined to show that a consignment of corn was sent by the Lakhimpur house to Ralli Brothers but that this was done in pursuance of a contract entered into between the Cawnpore house and Ralli Brothers. The contract being between these two firms, the Cawnpore house had necessarily in the first instance to pay the damages for breach of contract but it was quite right that the Lakhimpur house should have been debited with the payment of the damages if (as between the Lakhimpur house and the Cawnpore house) the grain was to come from Lakhimpur. If this item is to be taken as a specimen of the items suggested as fictitious we think that there is very little weight or force in the allegation put forward on behalf of the defendants as to fictitious entries. We think that the Court below was justified in accepting the indebtedness as between the Cawnpore house and the Lakhimpur house and the Gola house of the sum mentioned above.

It was argued that neither Shankar Lal nor Mannu Lal could be liable for any sum, because according to the contract between them and their brother Ghasi Ram they were entitled to share in the profits but they were not to be bound to contribute to any loss. We are perfectly certain that there was no such contract and we are quite certain that the learned Judge never intended to hold that such an absurd contract existed. No doubt Shankar Lal and Mannu Lal contributed no capital and the shares in the partnership given to them were in lieu of their services, but as partners they were entitled to profit and liable to loss in proportion to their shares. The last point was that the rate of interest, namely, 9 per cent was not the

rate agreed upon. On this point we see no reason to differ from the finding of the Court below. We think on the whole the case was carefully tried and justice done by the learned Subordinate Judge. We hope that the brothers may see their way to bring this litigation to a speedy determination without incurring further costs. The result is that the appeal fails and is dismissed with costs.

V.B./R.K.

Appeal dismissed.

A. I. R. 1918 Allahabad 23

BANERJI AND PIGGOTT, JJ.

Nannhu and others—Plaintiffs—Petitioners.

v.

Sri Thakurji Maharaj and others—Defendants—Opposite Parties.

Civil Revn. No. 8 of 1918, Decided on 28th June 1918, from an order of Dist. Judge, Farrukhabad, D/- 14th September 1917.

Agra Tenancy Act (2 of 1901), Ss. 158 and 167—Suit to declare muafi rights as proprietary rights—Revenue and not civil Court has jurisdiction.

A suit for a declaration that muafi rights have ripened into proprietary rights can only be brought in a Revenue Court and not in the civil Court.

[P 24 O 1]

*Gulzari Lal—*for Petitioners.

*Surendro Nath Sen—*for Opposite Parties.

Judgment.—The facts out of which this case arises are these: Respondent applied to the Revenue Court for partition of his share in a certain zamindari. The present applicants put in an objection claiming that they had acquired proprietary interest in certain plots of land which they were holding as rent free grantees. The Revenue Court considered this objection to be an objection raising a question of proprietary title and referred the present plaintiffs to the civil Court. Strictly speaking this order was not correct. The Court holding the partition proceedings could very easily have disposed of the objection on the ground that no Court had yet declared that the objectors had acquired proprietary title. However in accordance with the direction of the Revenue Court the plaintiffs instituted the present suit in the civil Court claiming a declaration that by reason of their holding the rent-free grant for more than fifty years and for two generations they had acquired proprietary interest in the land in dispute. The Court of first instance held that such a suit was not

cognizable by the civil Court and returned the plaint for presentation to the proper Court. On appeal this order was affirmed by the lower appellate Court. The present application is one for revision of the order of the appellate Court and the contention is that the suit was cognizable by the civil Court. We are of opinion that the view taken by the Court below is right. Under the provisions of S. 158, Agra Tenancy Act, it is the Revenue Court alone which could make a declaration that the muafi rights had ripened into proprietary rights. Having regard to the provisions of S. 167, and the fact that cases under S. 158, are mentioned in the Fourth Schedule as cases cognizable by the Revenue Court, a suit like the present could only be brought in the Revenue Court and not in the civil Court. The matter is concluded by the authority of the case of *Baldeo Singh v. Marden Singh* (1). Following that ruling, we hold that the present suit was not cognizable by the civil Court and the only Court in which the plaintiff could have claimed the declaration which he sought was the Revenue Court. We accordingly dismiss the application with costs.

V.B./R.K. *Application dismissed.*

(1) [1910] 6 I. C. 425.

* * A. I. R. 1918 Allahabad 24

PIGGOTT AND WALSH, JJ.

Lakhpai Rai and others—Plaintiffs—Appellants.

v.

Sri Kishan Das and others—Defendants—Respondents.

First Appeal No. 178 of 1917, Decided on 22nd May 1918, from decree of Addl. Judge, Farrukhabad.

**** Patents and Designs Act (2 of 1911), S. 3—Patent Invention, what is—Combination of old materials in new form can be patented.**

Plaintiffs invented a stove for the preparation of banslochan, a medicinal powder. The essential features of the process were the treatment of the raw substance at a red heat with sulphuric acid inside a closed crucible or retort made entirely of earthenware. The advantages involved were: (a) No iron or other metal being used in the composition of the crucible there was no danger of any deleterious action on the part of the furnace of the acid upon the metal; and (b) the retort or crucible being entirely closed from the time when the acid was added until the process of calcination was complete, there was no necessity of a chimney communicating with the retort for the purpose of carrying off the fumes of the acid. The action of the acid on the crude material under these conditions became more thorough and

satisfactory, and the possible nuisance from the escaping fumes of the acid was done away with:

Held: that this specification was a good subject-matter for a patent. [P 26 C 2]

Remfry, B. E. O'Connor, Tej Bahadur Sapru and S. M. Sulaiman—for Appellants.

Moti Lal Nehru and Surendra Nath Sen—for Respondents.

Walsh, J.—We have come to the conclusion that this appeal must succeed. There has been a very full discussion upon somewhat unfamiliar lines in this Court; but we have no doubt as to the proper conclusion which ought to be reached. The appeal is brought by the plaintiffs, the registered patentees of a process of manufacture, the plaintiffs consisting of Lakhpai Rai, Sampat Rai and Manful Narain, and carrying on business at No. 14, Mullick, Street, Calcutta against a judgment dismissing their suit brought against the defendants Srikishan Das, Bahal Rai and Bhoop Narain, carrying on business at Farrukhabad, for infringement of the patent. One Prag Narain, who figures somewhat prominently in the case, is a member of the plaintiffs' firm, but for reasons best known to the plaintiffs was not one of the applicants for the patent, and is therefore not a necessary party to the suit. The ground upon which the suit was dismissed was a question of fact, namely that the process for which the plaintiffs had obtained their patent had been anticipated and was one of common use in the trade.

Speaking for myself, I think it desirable to make one or two general observations. The patent law is a provision made by the legislature for the encouragement of research, industry and progress. It rewards genuine discoveries by giving them a limited monopoly and thereby seeks to encourage commercial enterprise and development. A patent suit in which the validity of an alleged discovery is challenged is one in which the Courts would seem to have a right to expect candour and honest dealing and genuine assistance in the often complex and difficult technical question of ascertaining whether the alleged new process is really a good subject-matter for a patent. In this case the parties appear to be men of position in their own commercial circle; each has charged the other with the perpetration or attempted perpetration of a mean and contemptible

fraud. There has obviously been a mass of hard swearing which has enormously increased the difficulties of the task thrown upon the Court. We have had to do our best to sift the truth from a mass of untruth. Apart from this aspect of the case which must seriously have prolonged the litigation, there is even a graver aspect. It is regrettable, and it is a matter to which those who are interested in the industrial development of this country might well direct their attention, that commercial disputes of this kind should be tainted by a mass of palpably dishonest evidence, unfair methods of competition, and conduct which decent people cannot but reprobate. Moreover the conduct of the case in Court (we are saying nothing about the learned gentlemen who appeared for either party before the Subordinate Judge who gave judgment in Farrukhabad; we refer particularly to some of the incidents when evidence was taken on commission) is characterised by a method of cross-examination in the case of independent and respectable professional witnesses, which is worthy of the worst traditions of the lowest forms of litigation and which is calculated, if indulged in as a practice in the way in which it was indulged in this case, to make our trial Courts a terror to self-respecting men and to produce a state of things under which only those will care to come and give evidence who have no character to lose.

We may say at once, as we are differing from the view of the facts taken by the lower Court, that we find very little assistance in the Subordinate Judge's judgment. It consists of a considerable amount of painstaking criticism, some of which is difficult to follow, some of which we find ourselves unable to agree with, while some of the conclusions are so overburdened with details that their weight is largely discounted. We therefore have to approach the consideration of the mass of conflicting evidence in this case unobscured by the existing decision and to form an independent judgment of our own. In one respect we are not at a very serious disadvantage. It so happens that the majority of the principal witnesses in the case were examined either on commission or by the learned Subordinate Judge's predecessor and were therefore not seen or heard by the learned Judge any more than they have been by

us. The controversy arises in this way. About 23rd June 1915 the plaintiffs applied to the Patent Office in Calcutta for a patent, the claim for which and the specification for which is contained in the document before us, specification No. 2191. The claim related to the manufacture of an ancient and well-known medicinal commodity called banslochan. As a matter of interest we may quote here the chemical description of this article as found in Professor Thompson's Pharmacopoeia.

<i>Percentage composition.</i>		
Silica (SiO_2 , silicon dioxide)		90.50
Potash (KOH, Potassium hydroxide)	1.10
Peroxide of Iron (Ferric iron Fe_2O_3)	0.90
Alumina (Aluminium Oxide Al_2O_3)	0.80
Carbon compounds and foreign matter	6.70
		<hr/> 100.00 <hr/>

The powder in question, which is manufactured by a calcining process from bamboo, is said to be a medicine for the home, and to possess certain restorative and invigorating qualities for the old as well as for the young which, if they do not entirely fulfil their promise, may at any rate account for their undoubted popularity. The powder is made from the interior of bamboo which is found in Singapore, by baking or calcining. According to the plaintiffs this process has up to, generally speaking, June 1915 been carried out by means of iron pans when the commodity is prepared in any substantial quantities. Of course they do not allege and no sane person could allege, that ordinary earthenware pans could not be and indeed were not in fact used from time to time by persons who wanted to prepare a small quantity for their own use without delay, but as a matter of trade use when the manufacturer is preparing the stuff in any quantity for the market, according to the allegation of the plaintiffs, the ordinary known method was by the use of iron pans in which the stuff was placed for the purpose of being cooked under great heat in a stove. According to them also the effects of the use of iron pans were to produce a rapid and intense heat operating directly upon the material; to

make the cost of the stove somewhat greater than if ordinary earthenware pans were used, particularly because the tendency of the iron pan was to wear out quickly and also to produce in the substance itself what has been called a brownish or reddish tint, specimens of which we have seen with our own eyes in bottles which have been exhibited in the case, and which is regarded in the market by those who know the stuff well without having a serious drawback, as something which makes the article inferior to the best standard. According to the plaintiffs also they were constantly worrying and working by experiments of various kinds to arrive at some satisfactory process of heating which would be cheaper and more satisfactory than the old method; and in substance they claim by this patent to have achieved that result by a combination of earthenware vessels placed one upon the top of the other in the stove as described and delineated in the specification, which method they say has the superior advantages of securing a slower heat enabling the material to be treated (as it always is treated at some stage and in some form or another) with sulphuric acid at a red heat, of confining the fumes produced by the sulphuric acid within a closed crucible and of producing a better colour of pure white or bluish white. There is less risk of the brownish or reddish tint manifesting itself and the production is regarded in the market as superior in appearance and quality and costs less. Another feature, according to their allegation, which distinguishes the new process from the old, is that in the latter stoves there was a chimney of greater or less height which carried away the fumes. The specification was ultimately accepted and was published to the world by a formal notice in the Gazette of India of 16th October 1915 in the following terms: "Improvement in the manufacture of a medical preparation, Patent 2191," which we feel bound to say in passing cannot be regarded as a satisfactory mode of summarizing the real claim which had been accepted by the office.

We now turn to certain other dates. On a date in July 1915, by a coincidence which can only be described as remarkable, one Maharaj Narain paid a visit to Calcutta. This Maharaj Narain, who gave evidence in the case for the defen-

dants' although not a member of the defendants' firm, was their general attorney and apparently the moving spirit. We think that the object of this visit has not been satisfactorily explained. Maharaj Narayan's reasons for it are twofold. He says he was desirous to make arrangements or to ascertain how arrangements could be made for securing the raw materials of bamboo from Singapore, and also to take lessons from one Munna Lal in the construction of the stove which was in common use for the manufacture of banslochan. A railway journey from Farrukhabad to Calcutta strikes us as a somewhat expensive mode of communication by post with Singapore. And if, as the defendants' case is, it be the fact that the plaintiffs' process of manufacture was well known throughout India and particularly in Farrukhabad and all that was necessary was for somebody on the spot to show the workmen in Farrukhabad how to build a stove, we do not see why it was necessary to go to Calcutta at all. The process of imparting the knowledge which Munna Lal possessed to the mind of Maharaj Narain appears to have occupied a considerable period. Although the visit took place in July, it is not suggested that the defendants began to build until September of the same year. The nature of the construction of the stove is such that the time occupied by instructing a competent workman how to make it and in fact producing one complete from top to bottom could not possibly amount to more than a week. Whether the course of lessons was more troublesome than had been anticipated, or whether there was an unexpected delay in obtaining the raw materials from Singapore, we do not know, but the next date which is important is 18th December 1915, when the defendants wrote to a customer in Delhi in these terms:

"Our compliments to you. We have started factory for manufacturing banslochan. All kinds of goods are in stock. The rates will be given below, please note them. The rates have fallen down on account of the opening of our factory; so you should send for goods from us, in order that you may derive benefit and our factory may receive help from you. We shall send goods of a very superior quality. Please send for a small quantity of goods as sample and see them. What more to add?"

And then follows a list of rates to which we shall refer in a moment. It is hardly to be wondered at, having regard

to the terms of that letter and to the fact that it is common ground that the process of manufacture referred to in that letter was precisely the same as the plaintiffs' patented process of manufacture, that the defendants have not seriously challenged the plaintiffs' contention that the plaintiffs' process of manufacture, if new, is certainly an improvement. The defendants have not attempted to explain in any way consistent with the ordinary conduct of honest business men the sudden enthusiasm, worked up one may say to almost white heat, which they displayed for the manufacture of banslochan between June and December 1915, but having regard to the fact that the rates per seer set out in their letter were a very substantial reduction upon the price then being charged by the plaintiffs and that the plaintiffs were admittedly practically in sole possession of the market, we have not the slightest doubt that on 18th December, when that letter was written and further back even when they determined to enter the market for the sale of this commodity, they knew perfectly well that whether it was a genuine discovery or not, the plaintiffs were coming upon the market with an alleged improved method of manufacturing this commodity which was likely to be a commercial success and that they had made up their minds, by fair means or by foul, to share the profits which they anticipated the plaintiffs were going to make if their invention were accepted by the public.

On 26th January 1916 an even more striking document came into existence. A telegram was sent to the defendants from Calcutta by another Maharaj Narain, who appears upon the stage for a moment and subsequently is seen no more in connexion with this case. The plaintiffs, by an application made in the course of the suit, not unnaturally showed considerable curiosity about this telegram and no doubt also as to what this Maharaj Narain was doing in Calcutta. That curiosity has never been satisfied as the defendants have not put this Maharaj Narain in the box. All we know about him is that he belongs to a younger generation, that he is the son of Bahal Rai, one of the defendants and that he wired to the defendants in the following terms:

"Lakhpai Rai doing registry of banslochan, come immediately."

It is to be observed that that telegram alleges, and it is quite possible that the plaintiffs themselves have alleged some time or another, that this patent gave them the sole right of manufacture and sale of the commodity itself. It does not refer to the process. It is quite clear however that Maharaj Narain, the general attorney of the defendants, to whom it was sent and who, that is to say, Maharaj Narain in Farrukhabad, undoubtedly received and dealt with the telegram, knew quite well that the telegram referred to a process and not merely to the commodity. What exactly he did, except a visit to Cawnpore to consult somebody, is not quite clear. But on 27th January he sent a telegram to the Controller of Patents, Calcutta, in the following terms:

"Application for patent process manufacture of bamboo camphor tendered by Lakhpai Rai, Sampat Rai or other party is for a process used by ourselves as several manufacturers are forwarding representation."

Two observations arise upon that document. Maharaj Narain would have us believe that the telegram which he had received from his namesake was the only information which he had upon the subject at all. We find it impossible to believe this statement. The telegram to the Controller of Patents shows that he knew perfectly well that the application dealt with the process of manufacture, no reference to which had been made in the telegram received from Calcutta but more than that, he alleged in the telegram sent within 24 hours of the news which he had received from Calcutta that the process for which application had been made was the same as that with which he was so familiar. It is impossible that he could have become aware of that fact, even if it were a fact, by means of the telegram from Calcutta. We are satisfied on these materials alone that the telegram was a disingenuous document sent expressly for some purpose of the defendants' own and that the conduct of Maharaj Narain and his perfectly hopeless attempts to get out of the difficulty are only evidence of the guilty conscience of a dishonest man. It does not however rest there. The telegram was followed up by a letter which it is necessary to examine very carefully, having regard to the statements about it made by Maharaj Narain when he was very naturally asked in cross-examination to explain its language. It is dated

27th January 1916, from Farrukhabad. It is signed "Sri Kishan Das by the pen of Maharaj Narain." It is however said on behalf of the defendants-respondents at the Bar before us I think it was not very clearly said at the trial to have been written by a scribe for Maharaj Narain when Maharaj Narain was in Cawnpore. It is in the following terms:

"We are informed that Lakhpai Rai Sampat Rai of 14 Mullick Street, Calcutta, have applied for permission to patent a process for the manufacture of bamboo camphor (banslochan). We have the honour to state that the same process has been in use by us for some time past and others have been using it for a still longer period. The object of this applicant is apparently to place obstacles in the way of our doing business, and although in our opinion there is nothing patentable in the process, we deem it necessary to record the fact that the process which the applicants propose to patent is not new"

(so far the letter merely repeats what had been said in the telegram and then follow these significant words) "and is in common use by a number of manufacturers in this district." The defendants' case at the trial, as we shall have occasion to point out in a moment, was that this process of manufacture had been adopted for the most part by firms in Calcutta for many years although they had during the last decade been driven out of the market by the plaintiffs. Maharaj Narain was therefore asked to explain the language used in this letter. He first said:

"I wrote in the letter to the Patent office that the said process for preparing banslochan was used by a number of manufacturers in the district, because two factories were then using that process and several other factories in this district had formerly used that process."

Now there can be no mistake about that sentence. He was confronted with the letter which he had written and he was asked by the cross-examiner, perfectly naturally and fairly, "to what you were referring," and he pledges himself on a critical question in the dispute to the fact, although not a tittle of evidence has been called to support it, that in the district, that is to say in Farrukhabad, because the writer was at Farrukhabad, there were two factories using that process and several other factories in the district had formerly used it. He could have had no doubt whatever as to the purport and meaning of the question which was put to him and as to the meaning of the answer which he gave. He was then reminded indirectly that his

case at the trial was that it was mainly in use in Calcutta and the cross-examiner put this question: "Can you state any reason why you did not mention about Calcutta in it?" He answered:

"I did not mention any place, but simply told him that several manufacturers used that process and I cannot say what he understood that he mentioned the words in this district."

So that after swearing point blank that he used the words in this district with special reference to factories which were really in his mind and realizing the difficulty that he got himself into having regard to the real facts which he was able to prove, he recanted and threw the blame on to the Babu to whom he was dictating the letter. We have dwelt upon this incident in the case, because it is only by such tests (they are specially valuable where you get a contemporaneous document under the hand of a witness which he cannot deny), fairly applied by a proper cross-examination, that you can prove the witnesses in a case of acute conflict of verbal testimony and see where the pinch comes. We have come to the conclusion that the conduct of Maharaj Narain, with regard to the statements which he made in the documents themselves and the hopeless attempt to get out of the difficulty in which he found himself when challenged on oath in the witness box, shows that he was a dishonest witness, that he was labouring under a guilty conscience and that there is no explanation of his conduct except upon the hypothesis, which the plaintiffs allege, that he was the moving spirit in an attempt to steal and purloin the plaintiffs' process from them by unfair means.

Shortly after this incident and the telegram of protest to the Controller of Patents, it being too late for the defendants to challenge the registration of the patent, they continued the manufacture which, it is admitted, is practically the same process as the plaintiffs' and thereby forced the plaintiffs to bring this suit. The plaintiffs ask for an injunction and for damages. The defendants, while alleging generally that the alleged invention is not really a good subject-matter for a patent, for example they say in para. 6 of their defence that it was the original form of stove in common use for a long time in India, raise a somewhat broader issue of fact on which the trial in the Court below and much of the dis-

cussion before us has really turned, namely, they have committed themselves to this somewhat startling proposition that not only other traders mostly in Calcutta, but even the plaintiffs themselves, have all along manufactured banslochan by this method which the plaintiffs now seek to patent; that it is really the only method known to the trade, that it is incapable of improvement; and that the plaintiffs have themselves been doing business by this method for some 12 or 13 years, and that they really were endeavouring to impose upon the Controller of Patents and the general public, not a thing in which they believed as a new discovery, but a thing which they knew was well known to others as well as to themselves and was an attempt to defraud the general public. Now that, as we have said, was a startling proposition which one would naturally require to be clearly and definitely established in fact. The defendants alleged in their answers to the interrogatories served upon them in the course of the suit by the plaintiffs the names of the firms relied upon by them as being those commonly using this process of manufacture;

(1) Hulasi Rai, Calcutta; (2) Hanuman Sahai Rameshar, Calcutta; (3) Bhagwan Das Munna Lal, Calcutta; (4) Prag Narain, Calcutta (now one of the plaintiffs' firm); (5) Lakhpai Rai Chhote Lal, Calcutta (the plaintiffs' firm); (6) Silchand Sakh, Calcutta; (7) Juggi Lal Bania, Farrukhabad; (8) Mathura Das-Sat Narain, Cawnpore.

Omitting from this list the two now connected with the plaintiffs' firm, these persons appear to have ceased business altogether for periods varying from 40 years to 15. It is not suggested that any of them has manufactured banslochan during the last 14 years. Two of them, or representatives of two of them, appeared in the box. All of them were admittedly failures in business. At the trial Munna Lal, one of them, was called and he spoke of three, two of whom are additions to the list which I have read, namely, Karim Baksh and Gappu Lal. But inasmuch as neither of them appeared in person at the trial no further reference need be made to their business. Reference will have to be made to the two witnesses Munna Lal and Rameshwar in a moment. But the striking fact and it is common ground between the

parties in this case, is that the plaintiffs by ordinary competition, and if the defendants' case is to be believed by the use of precisely the same process that the defendants themselves have been using and everybody else in the trade has been using, have succeeded during the last 12 or 13 years in securing a paramount position in the trade. All their rivals have been beaten out of the field and it is not suggested that during that period of 12 or 13 years the plaintiffs have enjoyed any superior advantage over their competitors, and the theory is that in spite of that fact, and although they have successfully carried on their business during that period, almost unrivalled, by the well-known process which was open to everybody, they nonetheless thought it necessary, so far as we can see, for no possible object either of gain or of anything else, to invent a story which could have been exposed and blown to pieces in five minutes by honest evidence, namely that all this time they have been adopting a totally different method, that they have been experimenting in new methods and only just discovered, and therefore went to the expense and trouble of obtaining a patent for this ancient method which was known to all. We think that theory has hopelessly broken down upon the evidence and that it is a hypothesis which would require overwhelming evidence for any Court to accept as the real truth.

Turning to the oral evidence, which it is necessary to examine in this case with the preface which we have already made, namely, that there is on the written evidence and on the admitted facts serious reason for doubting the honesty of the defendants' case, a very strong attack was made by the Hon'ble Motilal Nehru for the respondents upon the plaintiffs for not, as he put it, going into the box. We think this comment is really not justified. They did go into the box in the true sense of the word. The District Judge, who originally was intended to try this case, himself called Maharaj Narain for the defendants on the one side and Manful Narain, one of the plaintiffs, on the other side. Manful Narain gave his statement to the learned Judge describing in general language the present process, saying that in the old stove an iron tray had been used, that the present stove is closed above the trays while the

other was not so, that in the old stove there used to be a chimney while in the new there is no chimney, that under the old stove the working had been going on in his factory in Calcutta for many years, that he had never seen an earthen-bowl being used in any other factory until they decided to use it, and as far as he knew, for 13 or 14 years nobody in Calcutta had been manufacturing this stuff at all. We do not know what more the plaintiffs could say than this witness said, unless he was cross-examined in detail either by the Court or by the other party. A sort of argument was suggested that Mr. Remfry, who conducted the case for the plaintiffs in the Court below, ought to have put the man into the box again.

We cannot see the slightest reason why he should have done this. The witness had given a general account of his case consistent with the independent witnesses who were subsequently called to support it, and if the defendants thought that they could get anything out of this particular witness of whom they now make a grievance as not having been called at all, nothing was easier than for them to apply to the learned Judge at the trial to re-call him for cross-examination. It is idle to suggest that the provision in the Code which enables a Judge to call one of the parties and put him on oath, does not make the witness just as much a witness and make the evidence just as relevant, as if he is called by his own representative. And why in the world when he has given satisfactory evidence his legal representative should go through the ceremony of putting him into the box again for examination in-chief, we cannot for the life of us understand. But there is nothing in the point, even if there were any technical grievance which could be founded upon it, because Prag Narain, although not a plaintiff, is to all intents and purposes the same as a plaintiff; and he gave evidence at considerable length and his story was much to the same effect. He had obviously been working on his own account and had in 1911 joined the present plaintiffs in partnership. He described in detail the present form of manufacture and the old form of manufacture. He explained that the acid was mixed formerly with the dry banslochan and that the mixture was put into the stove. He said that acid was used

before putting banslochan into the stove, apparently referring to the process of washing before baking. He described the chimney which was formerly in use. He described how, for the last 18 months, they had ceased to use iron pans, and had used earthenware pans or kholis in their place. He said that the inventors were Lakhpatt Rai, Sampat Rai and Manful Narain, giving the three names of the plaintiffs excluding himself, which may mean that they all individually took part, or may mean nothing, namely that they were merely the owners and that somebody in their employ had lighted upon the idea. The only question is whether it was a real discovery, and he described the advantages of the new process in these terms :

"The new invention therein is this: three kholis, a handi and another handi to cover it and a gamla with a hole to cover it over which another handi is placed. This is the new invention. No stove of this kind was made before. Besides the above, there are four bricks inside the stove on which the three kholis rest and three bricks above to keep the gamla and the fact that fire affects kholis and handis from all sides. Besides this there is no new invention. By doing away with the chimney the benefit is that the fumes of acid formerly used to escape but now they materially affect the material and thoroughly clean it. This is the new invention in it."

And he mentions by the way that Dr. Hossack, whom we shall have to refer to in a moment, came and saw the process when iron pans were used, that he remained standing below the platform and asked a few questions for a space of five minutes, that they showed him how they mixed the acid into the crude banslochan, kept outside the stove, by pushing it in with a ladle and that no acid was used in his presence when the stuff became red hot. He also said that Dr. Hossack must have been in error or must have been misunderstood when he was reported as saying that the acid was thrown into the stuff, as it never was. In connexion with the evidence of this witness and of the conflict, if any, between him and Dr. Hossack, it is not unimportant to refer to the evidence of Mr. Briggs, commonly called Bugs in the book. He was called by the plaintiffs and was examined on commission and described himself as an analytical consulting chemist. He seems to have had good training in England and to have worked under a gentleman of experience in India since 1898. He was not a witness to any

fact but merely an expert upon the new process. Assuming the facts to be as alleged by the plaintiffs, he said that he thought the new stove was better. He had been shown what was alleged to be the old process, and therefore he believed the pans in it to be of iron, and upon that hypothesis he said that the new stove was better on account of its slow heat, whereas the old stove being of iron must be a fast heater. He had never seen a stove like the plaintiffs' before. But it does not appear that he had been in the way of seeing these stoves one way or the other in the past. But his opinion was that the effect of adding sulphuric acid to cold material would not be nearly so satisfactory as at a red heat, while on the other hand an attempt to add it at a white heat would be to lead to too rapid an evaporation, which might be dangerous, and in the former stove which he saw it would be impracticable.

He said it was not an ordinary accepted theory that sulphuric acid should be added at a red heat. And he suggested that the iron pan (it was only a belief on his part, but it is not without significance in its bearing upon the rest of the evidence) probably was the reason of the reddish or brownish appearance of banslochan which had been seen and objected to in the past, his theory being that the acid acting upon the iron-pan when hot would produce what he described as ferrous sulphate. He said that the furnace may be called a furnace on the reverberatory principle, and he made also this important statement. Having seen the stove which was alleged to be new and the stove which was alleged to be old, he said the stoves did resemble one another in outward appearance, although one was made of iron pans and the other of earthen vessels. The importance of that is (it is plain upon the evidence even if it is not plain to one's own intelligence) that you can only discover whether iron pans or earthen pans are used inside by some kind of physical or ocular test, and that you cannot possibly discover it by the naked eye when the place inside is a burning furnace. The next witness relied upon by the plaintiffs is Dr. Sandal. Dr. Sandal was a subordinate official in the Health Department in Calcutta, a kind of inspector of nuisances, whose business it was to go round and visit factories

under his superior officer, and he was subordinate at one time undoubtedly to the witness whom we shall refer to in a moment, Dr. Hossack. He gave a detailed account, which it is not necessary to recite, of the old system worked by the plaintiffs as he remembered it, and if his evidence is believed, the truth of this dispute would clearly be on the side of the plaintiffs.

A most violent attack, and in our opinion an entirely unjustifiable attack, was made upon this witness and for certain reasons which are material to other parts of the case, we propose to examine it in some detail. It is quite true that the witness was not a man of the highest academic qualifications and that he had bought, as other people have bought, an American degree. The curious feature of the impertinent and virulent attack upon his intellectual and academical qualifications, apart altogether from his personal character, was the fact that when he was asked a question as to whether the stove now used by the plaintiffs was an improvement, an objection was raised by the legal gentleman who subsequently cross-examined him about his intellectual qualifications, on the ground that he was not called as an expert, so that while the defendants objected to his answering a question as an expert, they delivered a cold-blooded and deliberate attack upon his educational qualifications. As a matter of fact he did not profess to be an expert in the real sense of the word and his answer, when he was allowed to give it, shows what was uppermost in his mind, namely his duties as an inspector of nuisances. He said:

"The present process that I have seen is far better and no nuisance is created either to the inmates of the house or to the neighbours and the material now is whiter and better than before."

It is due to this gentleman to say that he was in the employment of the Municipal Corporation of Calcutta for about 25 years and that he retired after that period owing to ill-health with a pension. He was challenged with the opinion of his superior officer and he answered as only an honest witness could do, that he did not think that Dr. Hossack was ever at the factory for any great length of time, but whatever he (Dr. Hossack) said he had seen he (the witness) could say nothing. He (the witness) was only there to speak to what he had seen.

Having failed by throwing every sort of mud at this witness for a considerable time to make the slightest impression upon his evidence, the defendants then embarked upon a new and more desperate form of attack. They deliberately accused this witness, not in the presence, be it observed, of the Court trying the case, but in the presence of a commissioner, of having offered to sell his evidence to them for Rs. 500 and they did this by the production in person of the two persons to whom the offer was supposed to have been made. Their names were Kunji Lal and Gappu Lal. It is impossible for us to shut our eyes to the fact that Gappu Lal is the name of the petitioner in an original suit which has been connected with this appeal and which has been heard by us, although judgment has been reserved, in which he, Gappu Lal, seeks to revoke this very patent, and that Gappu Lal and Kunji Lal, these two men, have given evidence before us in that suit testifying to their personal knowledge of the old process by which banslochan was manufactured.

Mr. Moti Lal for the respondents, contended, when we asked him why these two men to whom Dr. Sandal is alleged to have offered sell his evidence were not called, that the law did not permit him to put them into the box, but that by another section of the Evidence Act he was bound by the answer of the witness. If that view is correct, Dr. Sandal's evidence stands untainted and untouched by the attack upon him. But it is impossible for us not to ask ourselves the question why, if these two men were in a position to give evidence before us in another suit, one of them being actually the petitioner and an alleged manufacturer and seller of the substance (banslochan) who alleges that he has suffered a grievance through this patent and could testify to the fact that one of the principal witnesses called by the plaintiffs had made an offer to them to sell his evidence to the defendants, they were not called as witness in this suit. To that question there has been no attempt of any kind to make any answer. The learned Judge undoubtedly rejected the evidence of Dr. Sandal. We are unable quite to understand the ground on which the learned Judge refused to treat him as an honest witness. It is

true that Dr. Sandal admitted that he went for his own examination before the Commissioner on a date other than that on which he was really summoned, having reason to believe that he would be wanted on that date, and the learned Judge accepts the explanation in his judgment, but nonetheless he comes to the conclusion that this matter, which is satisfactorily explained, coupled with the negotiations about the purchase of his evidence makes the matter suspicious. The view of the learned Judge is that the evidence of a witness should be rejected if only he is asked questions sufficiently offensive to arouse suspicion as to his character. We cannot agree that this is a sufficient reason, and we see none for throwing over Dr. Sandal's evidence. It may be that Sanitary Inspectors are not always absolutely reliable, but they must be shown, and not presumed, to be untrustworthy.

The next witness relied upon by the plaintiffs was Dr. Mitter. Here again we have been ourselves unable to accept the somewhat hypercriticism to which this gentleman's evidence has been submitted by the lower Court. There does not seem to be anything extraordinary in Dr. Mitter's story that he, being a doctor on a ship between Singapore and Calcutta, made the acquaintance of one of the plaintiffs whose business was in both places and who was travelling backwards and forwards and as the result of this friendship he went to stay with the plaintiffs and had medically treated one of them, and was wandering about their premises and became acquainted with the manufacture which was going on and out of which they were making their living. And why a doctor should not, assuming that he was there and interested himself on a holiday in the manufacture of the article by which his friends were making a livelihood, take the opportunity of looking into the stove out of curiosity and satisfying himself whether it contained an ironpan or earthenware pan we do not quite see. However, the learned Judge seems to find something so uncommon in it that he regards it as not true at all, and in the course of his judgment he has come to the conclusion that none of the details of Dr. Mitter's story can be accepted. Being apparently dissatisfied in his own mind with that criticism he finally came to the conclu-

sion that Dr. Mitter was not there at all. But we think that there is no material on which we can treat Dr. Mitter otherwise than as an honest witness, who was desirous of giving the best assistance he could from his recollection. And again if Dr. Mitter's evidence is believed, the fact that the plaintiffs were using iron pans in the stove is clearly established. On the whole we think that the plaintiffs have made out a satisfactory case; that there is no reason for disbelieving the five witnesses to whom we have referred; that upon their evidence it is established that iron pans were formerly used; that the earthenware pans were new; that the present combination is an improvement and that it has the advantages claimed for it.

We have however to consider further how far the defendants' evidence makes a serious inroad upon this evidence. The defendants called a quantity of evidence. We have already given sufficient reason for distrusting the evidence of Maharaj Narain. The main features which the defendants otherwise rely upon are the evidence of Dr. Hossack, undoubtedly a scientific witness of high standing and respectability. Munna Lal who is alleged to have been in the trade and to have taught Maharaj Narain, and further a contemporaneous report made by one Mr. Kundu, a subordinate in the Health Department and a kind of inspector of nuisances subordinate to Dr. Hossack. We think that giving full weight to Dr. Hossack's evidence it really comes to very little. He was palpably an honest witness who frankly said that he was very hazy, and the more pressed he was upon details, the more he explained that his recollection was really a hazy one. It is but natural that a busy man like Dr. Hossack with important avocations should forget what he had seen long before, to which at the time he attached no importance and in which he had no concern; and when reminded about it should come to Court with a very hazy recollection of it. Whereas the case of a man like Dr. Mitter is quite different. Although he had no concern in the matter, being a friend of the plaintiffs, he might very naturally spend his leisure time in looking into their stove; but Dr. Hossack was a busy man engaged in his profession, and therefore the plaintiffs' case may be perfectly true

and everything that Dr. Hossack said may be perfectly honest, whereas it is impossible for the defendants' case to be true without convicting Dr. Sandal and Dr. Mitter of flagrant and deliberate perjury. This in itself is a reason for preferring the plaintiffs' story, supported as it is by witnesses who relate facts which could only be wilfully untrue, if untrue at all; whereas in so doing we do not cast the slightest discredit upon Dr. Hossack's testimony. We do not think that he was really prepared to commit himself upon the question whether the interior of the stove was iron or not.

It is plain from Dr. Brigg's evidence that he could not have examined it for himself at any rate with his eye, and he does not profess to have used any other means, and it is quite clear from the report which he made on 14th October 1909 that the process of calcining the bamboo camphor, in what he called a retort, with an addition of sulphuric acid occasionally, was being carried on in a stove which had a chimney—a fact wholly inconsistent with the defendants' case. In our opinion the evidence relied upon of Dr. Kundu, who is represented only by his report, ought really as a matter of law to be rejected. Dr. Kundu's report is alleged to be a public document under S. 35, Evidence Act. We think that it does not come within this category at all, certainly not for the purpose of proving a fact immaterial to the matter in respect of which he was making his report. But however that may be, Dr. Kundu is alive and available and was twice summoned by the defendants. The plaintiffs properly objected to the report. Their objection was overruled. They contend in one of their grounds of appeal that this report ought to have been rejected. We agree that it ought. On the other hand it has been referred to by both sides in the Court below and before us, and even if it was improperly admitted, we think that it would make no difference to our decision in any way. It refers to the addition of strong sulphuric acid at a white heat; it refers also to the existence of a chimney; and although it does describe the stove as a "native reverberatory furnace," which according to the best understanding of that expression is inconsistent with the method of iron pans which the plaintiffs say they were using, we are not satisfied

that a gentleman who thinks that a high chimney is useful for diminishing the amount of heat generated in a stove, is a gentleman whom a priori we can accept as fully acquainted with the technical meaning of the term "reverberatory furnace." The witness Rameshar does not appeal to us as a satisfactory witness. He said he worked this process according to the plaintiffs' method for 20 years.

If he did he made an astonishing mess of it. He has not attempted to work it during the last 20 years. He became the owner of the factory, in which it was alleged he had formerly worked, by a deed of gift from his former employer, the result of which was that the concern was wound up within a year. He frankly says that there is nobody now to be found in Calcutta who might have seen the stove which he had at that time, and when he was asked about the books relating to his business he made the astounding statement that a Mahomedan gentleman who lived in a bungalow wrote out the books, but he is not now to be found. Another witness relied upon was a man named Ram Kumar, who was a broker. If he is like most brokers, he interests himself more in the commission to be earned from a manufactured article of this kind than in the process by which it is brought into existence. He has not been at work since 1904. He says that somebody or his clerk has been receiving profits for him, but he does not know how much. He admits having been hard hit by the plaintiffs who have been selling this stuff without an agent, and really all that he says is that he never saw iron pans, but did see broken earthenware pans about the place where manufacture was going on, and that when he did see them he "sat down and talked." Nor can we attach much greater weight to the evidence of the gentleman, Govind Singh who visited Calcutta and stayed with the plaintiffs. His opportunity for seeing the internal construction of this stove was according to his first impression, from a window some fifteen yards away from where he was sleeping. When pressed, he thought he got a better view of it from the enclosure where he went to relieve nature. This gentleman is under the impression that Howrah Bridge is a kind of kuchha bridge of pipas covered with straw and mud; and if that is the best account he can give of it after visiting Calcutta (we

take judicial notice of the fact that Howrah Bridge is at times not unlike London Bridge in the middle of the day) if that is the best this gentleman can make of his impression of Howrah Bridge, we do not think that any importance can be attached to his recollection of the internal construction of the stove. Dr. Srivastav's evidence really consisted of no more than the recitation of what he had read in the journals, "Indian Forester" and "The Commercial Products of India." We may say that the Court below was mistaken in thinking that there was any legal ground for the admission of this witness's information of literature on the subject which was otherwise inadmissible; but it really contributes nothing to the case. The witnesses Chhedu and Sheoraj Narain, one of whom apparently is an old servant of the plaintiffs and the other, a relation of Manful Narain, one of the plaintiffs, is not on very friendly terms with them, sufficiently create doubt with regard to their power of observation in respect of the material drawn out from the fire. They say it was drawn out fifteen minutes after its treatment with the acid, whereas Munna Lal says the interval is two or three minutes.

So much for the defendants' witnesses, as a whole, many of whom no doubt were doing their honest best to give an account of what they saw. This brings us to the consideration of Munna Lal, and this is the evidence which from the defendants' side causes us more difficulty than anything else in the case. He tells a story which on the face of it is clear and not open to much criticism and it has been accepted by the learned Judge who, by the bye it should be observed, did not see him as he was examined on commission. We think however that his connexion with Maharaj Narain and with the defendants is very close, and that he is, if the expression may be used, tarred with the Maharaj Narain brush. We cannot accept as satisfactory, as we have already said, the story of Maharaj Narain's visit to Calcutta in July merely to take lessons from this witness, and one sentence in his cross-examination casts doubt upon the whole of his story. He committed himself to the positive statement that the plaintiffs had been using this process in Calcutta to his knowledge for 12 or 13 years.

We have come to the conclusion that this is not the fact. It therefore follows that Munna Lal, when he made that statement, stated that which he knew to be untrue. We have been much pressed, as the learned Judge in the Court below was impressed, by the contents of this man's books. We have seen them. They are not in a character, although my brother, Piggott, J., was able to read some of the figures, which was familiar either to the Commissioner who examined the witness or to the counsel who examined and cross examined him or to most of us in this Court. Without going in detail through the extracts which have been laid before us, it is true to say that they are not entries which by their sequence or by the way in which they occur amongst the other entries in the books absolutely recommend themselves. They do require some explanation, but the witness was not cross-examined upon this basis. He was not asked to explain them, and therefore no explanation was forthcoming and we are not prepared to say that they are untrustworthy in the sense that they do not represent actual contemporaneous entries; but after all they come to very little. It is true that he intended the Court to believe that the kholis and other earthenware articles, entered in these books as expenses connected with the stove, did relate to similar earthenware pans to those in the plaintiffs' stove and were used in connexion with what we have described as the plaintiffs' process of manufacture and were brought and entered in the books for that purpose. But the entries are anything but clear or convincing upon that point, for example in one place kholi or covering is entered at Rs. 4-14-3; in another, three kholis are entered at Rs. 2-4-0; in another three kholis are entered at Rs. 1-8-0; and in another three kholis are entered at Rs. 1-7-0; two handis at Rs. 3-9-0. These are not large or expensive or out of the way articles.

They can be bought anywhere in the bazar according to measurement, and therefore we ought not to be hypercritical about entries of this kind, but on the other hand it is obvious from the prices which we have mentioned that the sizes of these kholis were not all the same, and it is sufficient to say that while the entries are not inconsistent with the pur-

chase of earthenware vessels such as are necessary for a stove like the plaintiffs', they are equally consistent with the ordinary use, by persons interested in the manufacture of the article, of earthenware pans for mixing it or washing it, and having regard to the other evidence regarded as a whole and Munna Lal's close association with Maharaj Narain whom we unhesitatingly hold to be a dishonest witness, we do not think that either he or his books are sufficient to destroy the case which the plaintiffs have established. For these reasons we have come to the conclusion that the plaintiffs' case is true, that iron pans were used and that they themselves by experiment have discovered the better use by combination of the earthenware pans. We find that the essential features of the process patented by the plaintiffs are the treatment of the substance at a red heat with sulphuric acid inside a closed crucible or retort made entirely of earthenware. The advantages involved are: (a) No iron or other metal being used in the composition of the crucible there is no danger of any deleterious action on the part of the furnace of the acid upon the metal aforesaid; (b) the retort of the crucible is entirely closed from the time when the acid is added until the process of calcination is complete; this does away with the necessity of a chimney communicating with the retort, by means of which the fumes of the acid used to be carried off. The action of the acid on the crude material under these conditions appears to be more thorough and satisfactory, while the possible nuisance from the escaping fumes of the acid is done away with. We think this combination as embodied in the plaintiffs' specification is new, that no one ever worked it out before, that it effects a useful purpose in reaching the point of heat at which the treatment of sulphuric acid can be most effectively applied and in eliminating the brownish tint or iron matter from the material, so as to produce a purer colour and a better quality.

The question of law which has been vigorously argued therefore arises: whether this has been properly claimed by the plaintiffs in this specification as a good subject-matter. The specification must be read as a whole and the claim interpreted by the body of the specifica-

tion. There seems to have been some difficulty in deciding in many cases of improvements how far the law casts upon the applicant the obligation of making it clear to the public or to the workman of ordinary intelligence in the trade which portion of the combination is new and which is old. We do not think anything is to be gained by discussing at length the interesting series of authorities to which we are referred by counsel on either side. We propose to apply the principle as laid down in *Harrison v. Anderson Foundry Company* (1), to this case, which we hold to be one "of a new combination of admittedly old materials." The principle is enunciated in the following terms. The Lord Chancellor at page 578 says:

"If there is a patent for a combination the combination itself is ex necessitate the novelty; and the combination is also the merit, if it be a merit, which remains to be proved by evidence."

Lord Hatherley while, delivering his judgment in the same case, says at page 583:

"Well, my Lords, that being the case, the Judges extended, as it appears to me with great respect, the doctrine of *Foxwell v. Bostock* (2) in their application of it to this case. It was there held—and that, I think, was all that was held—that it is not competent to a man to take a well-known existing machine and having made some small improvement, to place that before the public and say: 'I have made a better machine. There is the sewing machine invented by so and so; I have improved upon that. That is mine; it is a much better machine than his.' That will not do: You must state clearly and distinctly what it is in which you say you have made an improvement. To use an illustration which was adopted, I think by James, L. J., in another case, it will not do, if you have invented gridiron pendulum, to say: 'I have invented a better clock than anybody else,' not telling the public what you have done to make it better than any other clock which is known. That principle was laid down in *Foxwell v. Bostock* (2) and I do not think that anything further was intended to be determined in that case. It could not have been meant in that case to say that where that happens, which may well happen, that a person, arranging his machinery in a totally different way from the way in which it has ever been before arranged, although every single particle of that machinery is a well-known implement produces an improved effect by his new arrangement, that new arrangement cannot be the subject of a patent. It may be that the levers may be perfectly well known in their mode of action, and it may be that all the other separate portions of the machinery to which the patent relates may be perfectly well-known; but if he says: 'I take all these well-known parts, and I adjust them in a manner totally different

from that in which they have ever before been adjusted. I have found out just what it is that has made these parts, though they may have been used in machinery, fail to produce their proper effect and it is this: that they have not been properly arranged. I have therefore reconsidered the whole matter and put all these several parts together in a mode in which they never were before arranged and have produced an improved effect by so doing.' I apprehend it is competent to that man so to do, and that it would be perfectly impossible for him to say what is new and what is old because ex concessis it is all old nobody ever before used it in the manner in which he has used it."

His Lordship further says at p. 586:

"That, my Lords, is what it appears to me the patentees have done by the claims which are contained at the end of the patent: 'Having thus particularly described the nature of our said invention and the manner in which the same is or may be performed, we have to state that we do not restrict ourselves to the precise details herein described delineated but what we believe to be novel and original, and therefore claim as the invention secured to us by the hereinbefore in part recited Letters Patent, is—first, the construction and arrangement of the parts of pattern mechanism and shuttle box moving and holding mechanism as herein distinguished generally.' That seems to me to be the one great claim for the whole. They say—we cannot tell you that this part or that part or the other part is in itself a new engine or a new machine, but we tell you that our combination of all those parts into a complete machine, affecting both the shuttle box moving apparatus and the pattern apparatus, is a new combination and we claim to be capable of carrying that out in an improved manner under the specification in our Letters Patent."

And Lord Penzance in the same case at p. 590 says:

"Having thus described what the novelty consisted in, were they bound to go further and state in what the novelty did not consist? In other words to point out everything that in the several parts or the subordinate combinations of them might be old and had been previously used? I cannot think that they were or that there is any authority in law for this requirement. If such a task were attempted to be fulfilled in reference to a machine so old, so largely altered, and so greatly improved from time to time as the weaving loom, it is not too much to say that it would be hardly possible to fulfil it without insufficiency or error. If the patentee accurately defines on the face of his specification his real invention, and the limits within which that which he claims as a novelty is confined he is not bound, as it seems to me, to go further and specify how it is, and why it is, that his invention is novel, or recapitulate all the particulars in which it differs from preceding arrangements."

Applying the principles laid down in that case we think the specification in this case satisfies the legal requirements so far as the claim for combination and construction of the stove even of old materials is concerned. A difficulty has

(1) [1876] 1 A. C. 574.

(2) [1864] 4 De G. J. & S. 298.

been raised with regard to the first part of the claim, where the patentees state that they claim in the preparation of the said substance the treatment of the same when red hot with an acid. We have purposely refrained from referring in detail to the evidence with regard to the use of acid. We think it clearly establishes what the plaintiffs have not seriously denied, that in some form or another and at some stage or another in the process of manufacture, acid has always been used for purifying the material. And there seemed at one time a difficulty with regard to this claim, namely, as to whether it was not either too wide, or too vague, or in itself old. Mr. Remfry for the appellants, accepted the principle relied upon by Mr. Motilal Nehru, for the respondents, in the case of *Brunton v. Hawkes* (3), where it was held that a patent which consisted of more than one claim would be bad if it definitely and independently claimed something which has shown itself to be bad for want of novelty. But after all the attack made upon this part of the plaintiffs' claim raises an issue of fact, first what is "red heat," whether it is understood and recognized as describing a particular stage in the process of heating which all members of the trade know, and whether assuming that to be the fact, it was in common use, that is to say, whether the application of sulphuric acid at that particular moment, known and accepted by the trade as accurately described by the words "red heat," was in itself an old process of manufacture.

We think that Mr. Remfry was well founded when he met this case by saying that there really was no dispute about that part of the case as a fact in the Court below and that if the defendants wanted to raise the question that "red heat" was not understood in the trade, or that being understood it was too vague and uncertain and left too wide a margin of variation to be capable of a claim, that was a matter which ought to be dealt with above all things by evidence which could inform the mind of the Court. The defendants, so far from adopting this attitude towards this part of the claim, accepted it, and embraced it and said that they had always done it themselves and that it was so well-known that it was accepted generally through the

(3) [1821] 4 B. & Ald. 541.

trade, and that nobody had any doubt what it meant. Having taken that attitude, it does not lie in their mouth here and now to contend that it is impossible to say what is meant by the words "red heat." Therefore we must hold that it is established that the treatment of sulphuric acid at "red heat," which is a defined stage in the process of heating, is well-known to the trade and perfectly intelligible and also new, as nobody in the case suggests that there was any defined or ascertained stage at which it was always done.

It is to be borne in mind and perhaps it is desirable that we should make it once more perfectly clear, that it is quite immaterial what one or more members of the plaintiffs' firm may have said about the rights which the patent really gives them. What they think about it cannot enlarge the rights which are actually conferred by the patent; and the patent does not confer upon the plaintiffs either the sole right to manufacture and sell the substance itself or even the sole right to apply sulphuric acid at red heat so that nobody may use it. What people cannot do is to manufacture an oven or stove substantially as described and illustrated in the specification for drying, heating, roasting and calcining the said substance, and to use such construction for the purpose of applying sulphuric acid in the process of preparing and heating the substance to a red heat in the stove. That is what the plaintiffs claim as patentees. That is what we think the plaintiffs have established, and that is what they have a right to patent. Mr. Remfry referred us to the case of *Plimpton v. Spiller* (4). The passage which particularly seems applicable to this case is at p.428 in the judgment of James, L. J.:

"It appears to me that in doing that he (his Lordship refers to Plimpton's claim) is claiming not a distinction and substantive invention but is claiming it as one of the merits and advantages of the entire construction which he has before given, and he is not in any way pretending or claiming to enlarge his monopoly."

We think that language applies to this case. A suggestion was made by Mr. Remfry in the course of his argument that if there was any difficulty in this connexion, it was possible even at this stage for the plaintiffs to withdraw this claim [*Plimpton v. Spiller* (4)] and apply for an amendment. In answer to

(4) [1877] 6 Ch. D. 412.

this we have no hesitation in saying that in our opinion the authorities he quoted are not applicable, and cannot be applicable, to an application made at the eleventh hour in a Court of appeal by an unsuccessful litigant in the Court below who made no application in that Court, and who is actually suing for infringement. The plaintiffs are entitled to an injunction substantially in the form referred to in Seton on Decrees at p. 549, restraining the defendants or their servants or agents or any of them from building, constructing, selling, using, or in any way dealing with a stove manufactured in accordance with the plaintiffs' patent, and that the plaintiffs are entitled to a certificate under S. 32 of the Act. With regard to damages the matter is not free from difficulty. We have already expressed our view of the defendants' conduct. We think it is clear that they went out of their way to purloin, if they could, the advantages of the discovery which the plaintiffs had made. On the other hand, no satisfactory case for damages was made out in the Court below for one reason because the plaintiffs failed to establish their right, and for another reason because the learned Judge seemed to think that the profit made by the defendants was the sole criterion. That can hardly be a sound view, having regard to the fact that the defendants deliberately tried to undersell the plaintiffs, and quoted prices below market price.

On the other hand Mr. Remfry, when challenged in this Court to make out a case, proceeded to claim damages or rather to frame his claim upon the evidence in the case, as he was entitled to damages as enjoying the monopoly for the sole sale of the article itself, which is not the case. We think the evidence before us does not enable us to come to a conclusion on the question of the actual damages suffered by the plaintiffs, and that in any event, having regard to the early stage in which the plaintiffs quite properly brought their suit, the amount involved does not make it worth while to award anything more than nominal damages. We therefore hold the plaintiffs entitled to the nominal damages of one rupee. We decree the injunction and grant a certificate and one rupee damages. We think under the circumstances the plaintiffs

are entitled to their full costs, which will include fees calculated on the higher scale on the subject-matter of Rs. 4,000, with the exception of so much of the court-fee as was paid in respect of the sum of Rs. 25,000 claimed under the head of damages; that much the plaintiffs must bear themselves.

Piggott, J.—I concur.

v.B./R K.

Suit decreed.

A. I. R. 1918 Allahabad 38

PIGGOTT AND WALSH, JJ.

Gopilal and others—Plaintiffs—Petitioners.

v.

Lakhpai Rai and others—Defendants—Opposite Parties.

Original Civil Suit No. 1 of 1917, Decided on 22nd May 1918.

Evidence Act (1872), S. 126—Communication made to a vakil in course of employment, whether by word of mouth or by demonstration, is inadmissible in evidence.

For the purposes of S. 126, it is immaterial whether the communication which is sought to be protected was verbal, that is to say, by word of mouth, or by demonstration. [P 39 C 1]

In a suit for the revocation of a patent in which the question for decision was the formation and process of working of a stove owned and used by the defendant, the plaintiff tendered in evidence a vakil who had been employed by the defendant in some previous proceedings and had, in the course and for the purposes of his employment, visited the defendant's premises at the latter's invitation, in order to make himself acquainted with the working of the stove:

Held: that the knowledge acquired by the vakil as to the formation and process of working of the stove amounted to a communication made to him by his client in the course and for the purposes of his employment and that therefore his evidence was inadmissible under S. 126.

[P 39 C 2]

Surendranath Sen—for Petitioners.

Remfry and Kamala Kanta Varma—for Opposite Parties.

Walsh, J.—It is necessary for us to dispose of a question which has arisen under S. 126, Evidence Act. The proceedings before us are a suit or petition brought by the applicant or petitioner to revoke certain Letters Patent granted to the respondent firm, consisting amongst others of a member named Lakhpai Rai, and the question which arises for decision is the formation and the process of the working of a certain stove owned and used by the respondent firm for the manufacture of banslochan. In the course of the proceedings on behalf of the petitioner a vakil of the name of A. K.

Banerji was tendered in evidence on behalf of the petitioner to prove the formation and the process of the working of this particular stove which was then in the possession of the aforesaid Lakhpat Rai. In the year 1895 the Municipal authorities took proceedings against the said Lakhpat Rai, or the firm of which he was then a member, for a nuisance by smell in the preparation of banslochan. The witness was employed by the firm to represent them as defendants in answer to that charge and in his capacity as a vakil he, at their invitation, visited their premises in order to make himself acquainted with the stove which it was alleged created the nuisance. A question was raised by a member of the Court as to whether any question could be asked from this witness as to the information conveyed to him by his clients with regard to the subject-matter in respect of which he was representing them. The decision of that question turns upon the language of S. 126:—"No vakil shall at any time be permitted unless with his client's express consent" (in this case the witness has got no consent from Lakhpat Rai),

"to disclose any communication made to him in the course and for the purpose of his employment as such vakil by or on behalf of his client."

Mr. Banerji told us that any knowledge which he had acquired as to the formation and the process of the working of the stove in question was acquired by him only in the course of and for the purpose of his employment as such vakil. The only question therefore which remains is as to whether any communication within the meaning of the section was made to him by his client. The exact fact which he proposed to prove was not disclosed and the nature of the communication was not given. We thought it undersirable to hear the evidence without first deciding whether it could under any circumstances be admissible. We think that as a matter of law it is immaterial whether the communication was verbal, that is to say, by word of mouth, or by demonstration. To our mind if the communication were of such a nature that the client had, for the purpose of enabling his vakil to defend the charge of nuisance, described the formation and the process of the working of the stove in his own language, it would be impossible to contend that such con-

versation would not be excluded by the rule of professional privilege laid down in S. 126. We think it follows that if the client, instead of giving the vakil a verbal description of the process itself, told him to go himself to see it, or pointed it out to him, that would equally be a communication within the meaning of the section.

This view is borne out really by proviso (2) of the section. In England there has been some discussion in the decided cases as to whether the rule of professional privilege applies to facts brought to the knowledge of a professional gentleman by his senses, i. e., facts observed by him; and it was decided, at any rate in one well-known case, that where a matter is in Court, and by his senses the counsel becomes aware that an entry in a book has been fabricated or altered after its production in evidence before the Court, this is a matter which is brought to his senses by observation independently altogether of his client and is a matter which, he is bound to disclose. But the Code says that any fact observed by the vakil in the course of his employment as such, showing that any crime or fraud has been committed since the commencement of his employment, is not protected. That clearly indicates that facts observed may be just as much communication as other communication in the ordinary way by word of mouth. The rule is a statutory rule and ought to be strictly applied, for at least two reasons. It is in the interest of the proper and honourable conduct of an honourable profession. If communications coming either directly or indirectly to the knowledge of the vakil or lawyer in the course of and for the purpose of his employment are not protected it is easy to conceive cases in which the vakil might become acquainted with circumstances, for example of crime, which it would be the ordinary duty of a citizen to communicate to the proper authorities, and he would render himself liable for prosecution under the Penal Code for not disclosing such information to the proper authorities. It is clear that professional gentlemen who do their duty ought not to be placed in a position of that kind. Secondly, it is of importance to the public that they should be protected in the right which the law gives them to defend themselves against

proceedings of all kinds with absolute freedom, untrammelled by the embarrassment of the possible consequences of failure to disclose the full facts within their knowledge to the expert assistance on which they rely for the conduct of their cases. It would be impossible for the ordinary man to consult a lawyer with anything like confidence, for example, about some machinery or system in his own premises about which he is litigating with a rival in trade, if, when the public authorities threatened him with a case for nuisance, he had to call a lawyer to assist him in answering that charge without knowing whether or not the lawyer might not the next day turn round and present his opponent in the civil suit with all the information which the lawyer had obtained from his otherwise unauthorized visit to his client's premises.

One word I should like to add. It was suggested to Dr. Sen that he should open his case by giving some indication of the broad lines on which he would proceed to tender evidence. I attach great importance to that duty. I am afraid, judging from the cases which come in appeal before this Court, it is not always as strictly regarded in the Courts of Subordinate Judges as it ought to be, so that the legal gentleman who represents the plaintiff or petitioner fails to give sufficient indication of the lines on which he proposes to present his evidence in Court. Counsel are here to assist the Court, and in a delicate matter of this kind (as far as we can see, the respondents to this application had no intimation or warning that this question was going to be raised), a party in our opinion has a right to be warned that a professional gentleman previously employed by him is going to be put in the box to disclose a communication made to him in the course and for the purpose of his employment, in order that he may have a full opportunity, not in the hurry and suddenness of surprise, but with care and deliberation, to decide whether he shall exercise the undoubted option he possesses in his own interest, in the interest of the Court or in the interest of public time, to waive his objection.

In addition to this, as my brother has remarked in the course of the argument, there are a number of authorities on the Indian law as codified. It is better where

a delicate question of this kind is going to be raised, that warning should be given so that an opportunity is provided for seeing whether the question is quite as clear as may be supposed by the legal gentleman intending to produce the evidence.

Piggott, J.—This is a suit for revocation of a patent. It was agreed that the evidence taken in the previous suit, which we have just disposed of, should be admissible in this suit. Upon the broad issue of fact, namely, that the patent is bad in law, either because it has been anticipated, or because it is not a proper subject-matter for a patent, we have made up our minds against the plaintiff for reasons which are contained in the judgment in First Appeal No. 178 of 1917 [*Lakhpur Rai v. Sri Kisan Das* (1)] delivered to-day and which may be found there by the applicant if he cares to read them. We do not think, having listened to Dr. Sen's argument and to the testimony of the witnesses Gopi Lal and Kunji Lal, given orally before us, that they have succeeded in shaking the conclusions arrived at by us in the other suit. No serious question has been raised about our jurisdiction to entertain this suit, and we must simply dismiss it with costs upon the ground that the claim has not been proved. We were invited to read certain learned authors on the subject of the ancient process of manufacture of banslochan. We declined to do so. So far as they were matters of opinion on admitted facts, there was no necessity for us to read them; so far as they were tendered for the purpose of proving any controverted fact in the suit, we were unable to discover any section of the Evidence Act which entitled us to read them. We therefore hold them to be inadmissible. The suit is dismissed with costs.

V.B./R.K.

Suit dismissed.

(1) A. I. R. 1918 All. 24=48 I. C. 450.

A. I. R. 1918 Allahabad 40

PIGGOTT AND WALSH, JJ.

Kunj Behari Lal—Defendant—Appellant.

v.

Laltu Singh and others — Plaintiffs—Respondents.

First Appeal No. 7 of 1916, Decided on 6th June 1918, from decree of Addl. Sub-Judge, Moradabad.

(a) **Hindu Law — Alienation — Widow—** Gift for religious purpose calculated to confer benefit upon deceased husband need not be in connexion with particular shradh ceremony.

There is no authority for the proposition that gifts for religious or charitable purposes made by a Hindu widow cannot be recognized under the Hindu law as calculated to confer any benefit upon the soul of her deceased husband unless they be made in connexion with a particular shradh ceremony. [P 43 C 2]

(b) **Hindu Law — Alienation — Widow—** Gift of reasonable portion of husband's property for charitable purpose and welfare of deceased husband is valid whether made through son or not.

A gift made by a Hindu widow of a reasonable portion of the property inherited by her from her husband, whether through her sons or not, for religious purposes with a view to the spiritual welfare of her deceased husband, is valid under the Hindu law and is binding upon the reversioner. [P 44 C 2 ; P 45 C 1]

(c) **Hindu Law—Alienation — Widow—**It is incumbent upon Hindu widow to perform certain indispensable ceremonies for spiritual welfare of late husband—If property is alienated for such purpose proportion of property alienated with whole property is not material — Only thing to be considered is whether alienation was reasonable.

There are ceremonies and duties incumbent upon a Hindu widow, in the sense that their performance is regarded as indispensable to the spiritual welfare of her late husband. These duties she is under an obligation to perform and these ceremonies she must carry out, and for this purpose she has a power of alienation in respect of the corpus of the property in her hands, independent altogether of the proportion which the property alienated may bear to the whole. In the case of an alienation for a purpose regarded as indispensable to the spiritual welfare of the late husband, the question will not be, what proportion does the property alienated bear to the entire estate, but only was the alienation a reasonable one under the circumstances in the sense that the expenditure incurred was such as might be regarded as suitable to the position of the family. [P 44 C 1]

B. E. O'Connor and Iqbal Ahmad — for Appellant.

Tej Bahadur Sapru and Radha Kant Malaviya—for Respondents.

Piggott, J.—The suit out of which this appeal arises was brought on the following state of facts : One Raja Gur Sahai died in the year 1868 possessed of immovable property of considerable value in the districts of Moradabad and Bulandshahr. He left him surviving two sons and a widow. The sons died in 1873, while still minors and leaving no issue. The widow Rani Kishori Kuar thereupon entered into possession of the estate, strictly speaking in succession to her sons, or rather to that one of her two sons who survived the other. For prac-

tical purposes it is sufficient to say that she took possession of the property with the estate of a Hindu widow. Shortly afterwards she went on a pilgrimage in the course of which she visited Allahabad, Benares, Gaya and Jagannath. At the last named place she made an oral gift, or I should perhaps say the promise of a gift, to certain priests of the temple of Jagannath, and this transfer of property was carried into effect by a deed of 8th January 1876, executed by Rani Kishori Kuar after her return to Moradabad and registered on the admission of her agent (general-attorney) Ajab Singh.

The question whether the donees under this deed of gift had any right to transfer the property thus taken by them does not arise in the present suit. There have been transfers, and the contesting defendant in this case, Kunj Behari Lal, acquired so much of the gifted property as consisted of shares in four villages for good consideration, under a sale deed of 27th September 1909. Prior to this Rani Kishori Kuar had died, namely, on 15th August 1907 ; and after much litigation the plaintiff Laltu Singh succeeded in establishing his claim to succeed as the nearest reversioner to the estate of the late Raja Gur Sahai. The object of the present suit is to obtain a decision that the transfer purporting to be effected by the deed of gift, dated 8th January 1876, either passed no title at all, or at any rate conveyed no estate lasting beyond the lifetime of Rani Kishori Kuar, and thereupon to recover possession of the gifted property. It is alleged in the plaint that the Pandas of Jagannath had colluded with Ajab Singh already mentioned and with other karindas and servants of Rani Kishori Kuar and had obtained the execution of this document without the lady's understanding what she was assigning or even comprehending the contents of the deed or its effect upon her interests.

Any one reading the plaint would be disposed to assume that this was the main point of the plaintiff's case. The learned Subordinate Judge however has lumped the question raised by these pleadings into a single issue along with the wholly different question of the capacity of Rani Kishori Kuar, as a Hindu widow in possession of the property of her late husband, to make a gratuitous transfer of this sort. The result is that.

the evidence produced on what should have been the main question for trial in the case is scanty and unsatisfactory and that this issue has not been decided at all by the trial Court. The learned Subordinate Judge says that he will presume that the deed of gift was really executed by Rani Kishori Kuar after fully understanding its nature and effect; but he holds that she had no authority as a Hindu widow to make a gratuitous transfer of this property beyond her lifetime. We have had to consider the question of the intelligent execution of the document and it is necessary for us to come to a finding upon the point. The transaction is an old one, and such oral evidence as the parties endeavoured to produce amounts to little and does not seem worth discussion; but I am impressed with the evidence given by the witnesses Shiam Sarup and Nathu Ram as to Rani Kishori Kuar's business capacity and the manner in which she looked after her estate. The lady was illiterate, but she seems to have possessed a considerable degree of intelligence and business capacity. She did not remain shut up in her residence in Moradabad but went about visiting different portions of her property and personally superintending the management of the same. Under such circumstances the mere fact that she never challenged this alienation in her lifetime would warrant the presumption that she fully understood the transaction at the time when she executed the deed of gift. Fortunately the defendant-appellant has been able to bring on the record in this Court a piece of documentary evidence which carries the matter a good deal further.

In the year 1893 Rani Kishori Kuar was examined on commission in connexion with another litigation. She there stated that she had a distinct recollection of having made the gift now in question to the Pandas or officiating priests of the temple of Jagannathji. She mentioned from memory the most essential portions of the contents of this document, naming the village of Sherpur which formed the principal item of property transferred. Under all the circumstances, and in view of the manner in which this particular point was litigated in the Court below, I think we need have no hesitation in coming to the finding that Rani Kishori Kuar executed this deed of

gift with full knowledge and adequate understanding of its contents and of its effect upon her interests.

In the Court below various alternative lines of defence were relied on by the present appellant, but most of the pleas embodied in the memorandum of appeal before us have not been pressed. Now that we have already found in favour of the defendant upon the question of the intelligent execution of the document, the only further point for our consideration is the authority of Rani Kishori Kuar to make this transfer. The question of law thus raised is discussed at considerable length in the judgment under appeal and has been very completely argued out before us with reference to a large number of authorities. I think I may say that very little attempt has been made before us to support the decision of the Court below on the line of argument on which it proceeds. The learned Subordinate Judge would seem to have misunderstood the pronouncement of their Lordships of the Privy Council which forms the foundation of the subsequent case law on the subject, and he has throughout discussed the question of the validity of this gift as if it were in some way connected with the question whether Rani Kishori Kuar would have been entitled to alienate any portion of her late husband's estate in order to meet the expenses of her pilgrimage to the holy places of northern India. The latter question does not arise at all. The lady would seem to have met the expenses of this pilgrimage out of the income of her husband's estate over which income she had full disposing power. We have simply to consider whether she had or had not a right to make this particular gift in favour of the idol worshipped in the temple of Jagannath and the attendant priests. The foundation of the case-law on the subject is the decision referred to and misrepresented by the learned Subordinate Judge, namely the case of *Collector of Masulipatam v. Cavalry Vencata Narrainapah* (1). The important passage frequently quoted in subsequent decisions is to be found at p. 551 and may be quoted once more in this place:

"For religious or charitable purposes or those which are supposed to conduce to the spiritual welfare of her husband she (i. e., the Hindu widow) has a larger power of disposition than that which she possesses for purely worldly purposes."

(1) [1859 61] 8 M. I. A. 529 (P.C.).

In the present case the gift to the temple and to the attendant priests appears on the face of it to be an alienation for religious and charitable purposes. The immediate object of the alienation as cited in the deed itself is

"for the salvation of my husband and his family members and for my own salvation."

In a recent case before the Calcutta High Court, *Khub Lal Singh v. Ajodhya Misser* (2), the question of law now under consideration was discussed at great length. Previous authorities were reviewed and a decision was pronounced by a Bench which included one of the most distinguished Hindu Judges who adorned the Bench of that Court. The important principles laid down by him I take to be the following:

"There is a distinction between legal necessity for worldly purposes on the one hand and the promotion of the spiritual welfare of the deceased on the other hand. A gift of a moderate portion of the property of her husband by the widow with a view to his spiritual benefit is valid. Whether an alienation covers a reasonable portion of the property of her husband is a question which must be determined with reference to the circumstances of each particular disposition."

The point which has been pressed upon us with great learning and ingenuity on behalf of the respondent to this appeal turns upon the meaning to be attached to the words "with a view to his spiritual benefit" in the principle above laid down. It was contended that those proceedings by means of which a Hindu widow may seek to promote the spiritual welfare of her late husband can be ascertained with certainty from authoritative text-books accepted by Hindus generally and that the question whether a particular gift, made under certain circumstances, would or would not be accepted by Hindu opinion as conferring a spiritual benefit upon the deceased husband of the donor was a pure question of law which could be settled upon authority, independently altogether of the question whether the object of the gift was or was not one which any ordinary persons would accept as fulfilling a religious or charitable purpose. When this argument came to be further pressed, with reference to the particular authorities and texts on which it proceeded, it proved to amount to this: that it is only by means of those rites and ceremonies connected with the funeral of the deceased or with the subse-

quent commemoration of his death, generally known under the name of *sradh*, that the spiritual welfare of a deceased Hindu can be promoted.

Consequently it was contended that the only gifts made for religious or charitable purposes by which a Hindu widow could be regarded as promoting the spiritual welfare of her late husband would be gifts made in connexion with some *sradh* ceremony. The argument is an ingenious one; but the question can scarcely be regarded as coming before us at this stage of its history as purely *res integra*. There is a mass of case law on the subject, a great deal of which has been expounded to us on behalf of the parties to the present appeal. It is impossible to point to a single case in which an alienation by a Hindu widow has been set aside only on the ground that it was not made in connexion with a *Sradh* ceremony of the deceased. It is quite true that there are at least two decisions of the Madras High Court in *Lakshminarayana v. Dasu* (3) and in *Vappuluri Tatayya v. Garinalla Ramakrishnamma* (4), in which the fact that the alienation was made in connexion with a *sradh* ceremony is insisted upon in such a fashion as to show that it was of considerable importance in the minds of the learned Judges. The question whether this is an indispensable condition to the validity of a gift can be tested by examining a few cases in which such alienations have been set aside. Take for instance the case of *Rama v. Ranga* (5). The learned Judges set forth the objects for which the particular alienation which they were considering had been made. Now that alienation, on the face of it, had nothing to do with a *sradh* ceremony of the deceased; but it was not set aside on that ground. It was pointed out that the ceremonies for the sake of which the widow in that case had sold a portion of her late husband's estate were not of the kind regarded by the Hindu religion as indispensable for the spiritual benefit of her late husband, such as funeral obsequies and ceremonies incident to those obsequies. They then proceeded to hold that they could not justify the alienation

(3) [1888] 11 Mad. 288.

(4) [1910] 84 Mad. 288=6 I. O. 240.

(5) [1885] 8 Mad. 552.

(2) [1915] 43 Cal. 574=81 I. O. 483.

"unless such sale is reasonable in the circumstances of the family and the property alienated is but a small portion of the property inherited from her husband."

The principle underlying the decision appears to be that there are ceremonies and, I may add, duties incumbent upon a Hindu widow, in the sense that their performance is regarded as indispensable to the spiritual welfare of her late husband. These duties she is under an obligation to perform and these ceremonies she must carry out, and for this purpose she has a power of alienation in respect of the corpus of the property in her hands, independent altogether of the proportion which the property alienated may bear to the whole. In the case of an alienation for a purpose regarded as indispensable to the spiritual welfare of the late husband, the question will not be, what proportion does the property alienated bear to the entire estate, but only, was the alienation a reasonable one under the circumstances, in the sense that the expenditure incurred was such as might be regarded as suitable to the position of the family. The learned Judges however recognized the possibility of alienations made by a Hindu widow for the purpose of doing pious acts for the benefit of her late husband which are not in the nature of spiritual necessities; and with regard to alienations made for such a purpose as this, they say that they would be prepared to take into consideration such questions as the proportion borne by the property alienated to the value of the entire estate. The same sort of principle seems to be implied in *Ram Kawal Singh v. Ram Kishore Das* (6), where the learned Judges finally came to the conclusion that the alienation which they were considering could not be supported, either on the ground that it was a religious necessity (that is to say indispensable to the spiritual welfare of the husband) or that, being for a pious purpose, the property alienated was small in value and represented only a very small portion of the estate inherited.

The same may be said of the latest pronouncement of the Bombay High Court in *Panchanand Chhotalal v. Manoharlal Nandlal* (7). We have been referred to two decisions of this Court:

(1) in *Puran Dai v. Jai Narain* (8). There stress was laid upon the fact that the alienation which the Court had to consider had been made without any reference whatever to the idea of conferring spiritual benefit upon the deceased husband, but apparently for the spiritual benefit of the widow alone. The other case of this Court is that of *Balkishan Bharthi v. Sat Ram Singh* (9). This case is of considerable importance as containing a review of the previous case-law by the learned Hindu Judge of this Court who is still with us. The principle he desired to affirm is to be found in the Tagore Law Lectures, 1879, at p. 309:

"A gift by a widow of the whole of her husband's estate is invalid; but a gift of a moderate portion of the property made by the widow for the spiritual benefit of her husband may be valid."

In the case then before him the learned Judge found that the gift which he had to consider, comprising as it did practically the whole of her late husband's estate, was one which the widow was not justified in making. On the line of reasoning which he followed it seems clear that he would have affirmed the gift, if it had affected property forming only a small fraction of the entire estate.

In this connexion we were also asked on behalf of the respondent to attach considerable importance to the fact that Rani Kishori Kuar had taken the estate in succession to her son, and not immediately on "the death of her husband." Under the circumstances of the case, I do not think this fact is of serious importance. To begin with, the recital in the deed of gift itself, setting forth that the donor desired to confer spiritual benefit upon her late husband and upon his family members, is quite sufficient to include the spiritual welfare of these two boys who died before attaining majority. Apart from this I do not think it would be just to take too rigid and technical view of the position of a Hindu widow who had entered into possession of her late husband's estate after a short interval, during which her two minor sons died. She naturally treated the estate as that of her husband and regarded herself as being in possession in virtue of her rights as his widow. It could scarcely be suggested that her power of alienation for the spiritual benefit of the former owner of the estate

(6) [1895] 22 Cal. 506.

(7) [1918] 42 Bom. 136=43 I. C. 729.

(8) [1882] 4 All. 482.

(9) [1908] A. W. N. 202.

is so rigidly limited that in all circumstances the person whose spiritual benefit is sought must have been the last male owner. In the present case, for instance, it could scarcely be contended that no alienation of property by way of gift would be valid unless expressly made for the benefit of that particular one of the two sons of Raja Gur Sahai who survived the other and who was therefore for a brief interval the sole owner of the estate.

Leaving this question for the present, we have to go on to consider what was after all the value of the property transferred under this gift in comparison with the entire value of the Raja's estate. That gentleman executed a will in the year 1864 to which he appended a specification of his property, showing that he had zamindari rights in more than 80 villages and a great deal of house property in Moradabad and in Amroha. Two years later, that is to say in 1866, he received from the Government a formal sanad granting him zamindari property bringing in a total revenue of Rs. 10,195-13-4, for his Mutiny services. I think this must have been to some extent a confirmation of a grant previously made; for I find some of the properties included in this sanad, at p. A-23, also included in the specification given at the foot of the will, at pp. 19-A and 20-A. It is clear however that the grant received under the sanad was much less in value than the property dealt with under the will. Taking the land revenue assessment as a rough test, it would seem that the proprietary rights in the four villages affected by the deed of gift in suit amounted to little more than 1/40th of the property granted to Raja Gur Sahai under the sanad. Taking the house property into consideration, and forming such rough estimate as seems reasonably possible, I should feel no hesitation in holding that the value of the property in suit cannot have amounted to more than 1/80th part of the entire estate. There is another line of reasoning leading to very much the same conclusion. There was evidence given that the income enjoyed by Rani Kishori Kuar from the entire estate was at least Rs. 6,000 a year. The income derivable from the zamindari property included in the deed of gift would seem to have varied considerably from time to time, if we are to judge

from different leases which have been produced in evidence by the two parties.

The Government land revenue assessed upon this particular property has apparently risen from Rs. 280 in 1862 to Rs. 545. The plaintiff has proved two leases of the years 1862 and 1869. Under the former the property in question was leased out at a net profit of Rs. 635 a year. Under the latter the net profit must have been Rs. 870. There is certainly no evidence on the record which would justify us in putting the net annual profits derivable from the villages in question at more than Rs. 800. Taking it at that figure it amounts to about 1/75th of the annual income enjoyed by Rani Kishori Kuar. I think we may come without serious hesitation to a finding that the value of the property dealt with by this deed of gift was not more than 1/75th of the entire estate of Raja Gur Sahai as it passed into the hands of Rani Kishori Kuar. There has been something said in argument about that lady's management of the estate during the entire period covered by her possession. On the one hand the appellant relied upon an admission made by the principal plaintiff to the effect that the income of the property had gone up by something like 25 per cent, since the death of the Raja; and I was disposed at first to assume that this increase represented the result of purchases made by the lady out of the surplus income of the estate. That such purchases were made by her seems to be true, as there is a statement to that effect by the lady in her deposition of the year 1893, which does not seem to have been challenged at the time. On the other hand something has been said on behalf of the plaintiff-respondent that this is not the only alienation by the lady which he has been compelled to challenge. It was no part of the case set up in the plaint that there had been other alienations. As a matter of fact, the only evidence is to the effect that the lady, not long before she died, tried to dedicate permanently for the benefit of a temple built by her husband in Moradabad two shops the income of which had always been spent on the temple by the orders of her husband. On the whole this lady's management of the estate does not seem to have been in any way extravagant, and on the evidence as it stands

the finding seems to be justified that, even allowing for the alienation contested in the present suit, the lady must have passed on to the reversionary heir an estate certainly not less in value than that which she had received on the death of the survivor of her two sons, while the probability is that it had increased in value. Under these circumstances I think we need have no hesitation in holding that the gift now in question was a gift of a moderate portion only of the property of her late husband, that it was a gift for religious and pious purposes, and that it was made by the lady, not solely with a view to her own spiritual benefit, but in order that the spiritual merit likely to accrue from the same might benefit herself, her late husband, and her sons. It is obviously impossible to ask a Court of justice to record a finding that any particular act done by the surviving widow either did or did not benefit her late husband in that changed environment to which he may be presumed to have passed after that episode in life which men call death; nor can we accept the contention on behalf of the respondent that gifts for religious or charitable purposes made by a Hindu widow cannot be recognized under the Hindu law as calculated to confer any benefit upon the soul of her deceased husband unless they be made in connexion with particular funeral ceremonies. I think the present alienation should be affirmed as a gift for religious and charitable purposes, reasonable under the circumstances, and effected by the donor in good faith for the spiritual benefit of the late owners of the property as well as for her own. These findings are sufficient to dispose of the appeal, which I would allow accordingly; and setting aside the decree and order of the Court below, would dismiss the plaintiff's suit with costs throughout, including fees in this Court on the higher scale.

Walsh, J.—Three questions arise for decision in this case: one, a question of law, whether a gift by a Hindu widow of property, inherited from her husband, whether through her sons or not, made for religious purposes whether with a view to the welfare of her deceased husband's soul or not, is binding upon the reversioner; secondly, the question of fact whether under the circumstances of this case the gift which is attacked was in

excess of what has been regarded by the law as a reasonable proportion of the whole estate. Thirdly, whether the deceased lady understood and intended to carry out the terms of the deed.

It is clearly established that in or about 1876 when she made this gift, she was a *pardanashin* and illiterate lady possessed of "great managing power." It is proved that she managed her affairs with great ability. She took tours to the various villages which comprised the substantial estate which her husband had left. She received and considered applications from her tenants. She met their wishes and endeavoured to remove their grievances. She made purchases by way of accretion to the estate out of the savings at her disposal. She gave on oath in 1893 a fairly clear account of this part of her business, saying that her agents were acquainted with the details. No lease of the estate was made without her sanction, and the plaintiff in this case admitted on oath that the property while in her hands in one way or another increased in value by at least 25 per cent. The evidence clearly shows her to have been, in spite of lack of education, a woman of character and capacity.

The terms of the deed attacked are remarkably simple and clear. They have all the appearance of genuineness. She declared in the only way possible that she, as an honest and religious woman, executed this deed of transfer in performance of a promise she had previously given to the Pandas when on a pilgrimage of her own and that she was doing so for the salvation of her husband, his family and herself. She seems to have taken every precaution that there should be no possibility of doubt as to the reality and legality of the transaction and as to the value of the property of which she was so disposing. This deed, according to the first argument presented to us on behalf of the successful plaintiff, is one which the Hindu law does not permit under any circumstances. I am bound to say that nothing surprises me more than the contrast between the veneration with which these pious acts for the welfare of a departed soul are regarded by the Hindu community and the vehemence and determination with which they are attacked by individual members of that community. The plaintiff in this case is himself a Hindu

and would presumably suggest to, if not inculcate upon, the members of his own family the very conduct which he asks us as a matter of general Hindu law to declare to be invalid. If he cares to know my opinion, conduct of this kind seems to me more calculated than any thing else to discourage the carrying out in practice of the precepts which the Hindu community teaches. The attempt has hopelessly failed. To my mind the law is well-settled, and if it had not been so earnestly argued by Dr. Sapru for the respondent, I should have said it was absolutely unarguable. Whether it is necessary to establish that the intention of the donor was to confer spiritual benefit upon the soul of the departed, or whether it is sufficient in given circumstances that the object of the deed itself is shown to be religious (the latter proposition seems to have been laid down by the Privy Council when they used the word "or" in the passage which has already been referred to) does not matter in this case, because the lady clearly put the benefit to her husband's soul and the salvation of the other members of his family before her own.

In my opinion the matter is as clearly settled as anything can be by a consistent course of authority from 1861 when the case already referred to was decided by the Privy Council and reported in 8 M. I. A., *Collector of Masulipatam v. Cavalry Vencata Narrainapah* (1) down to the recent decision in 1915 by Mookerji, J. reported as *Khub Lal Singh v. Ayodhya Misser* (2). It so happens that the last decision was delivered six days before the judgment in this particular case and was no doubt not known to the learned Subordinate Judge. But I do not think that it contained anything new, and the intermediate cases between those two termini, although they may be cited to justify the statement of the law as contained in Mookerji's judgment, do not add anything to it or take anything from it. The judgment of Mookerji, J. is an amplification of, and an admirable commentary upon, the judgment of Privy Council in 8 M. I. A., *Collector of Masulipatam v. Cavalry Vencata Narrainapah* (1). It shows how accurate the language used in the judgment of the Privy Council was and it may be cited as a correct statement of the old law with a full exposition cal-

culated to remove ambiguity, and I therefore cite from it the following passage as a correct statement of the law on the first question in this appeal:

"The true rule thus appears to be that there is a distinction between legal necessity for worldly purposes on the one hand, and the promotion of the spiritual welfare of the deceased on the other hand, and that, within proper limits, the widow may alienate her husband's property, for the performance of religious acts which are supposed to conduce to his spiritual benefit."

He cites also a passage from the judgment of Lord Gifford in *Cossinaut Bysack v. Cummolemoney Dossee* (10), showing further the settled and ancient character of this well known rule of Hindu law:

"It is absolutely impossible to define the extent and limit of the power of the widow to dispose of her husband's property for religious purposes, because it must depend upon the circumstances of the disposition."

Mookerji, J. goes on to point out that a question of fact has always to be determined, namely, whether the alienation covers a reasonable portion of the property of the husband, with reference to the circumstances of the particular disposition, and he cites other authorities which may be found on page 385 of his (Mookerji's J.) judgment, one goes back to the year 1826, indicating that 3/16 of the entire estate had been held not excessive, and in another case a gift of property between 1/4 and 1/3 of the whole had been upheld. Many of the authorities cited to the learned Subordinate Judge and referred to in his judgment seem to have been relied on rather for the purpose of confusing him than for any legal purpose which I can discover. He has unfortunately in his judgment confused the question of legal necessity with the question of the validity of a gift made for religious purposes. It may be that the defendants contributed to this confusion by pleading "legal necessity" in para. 8 of their defence. To my mind no authority bearing upon the question of legal necessity ever had any relevance to this suit and should never have been cited in the Court below. At one time the learned Subordinate Judge in his judgment said that the point raised was fully concluded by authority. At another time he found as a question of fact that the pilgrimage of the lady was absolutely unnecessary, and finally he says:

"To sum up the lady had no necessity to transfer the property as she had ample means to defray the expenses for pilgrimage to holy places."

(10) 2 Morley's Digest 198.

and for any offerings she may have desired to make."

As brother has pointed out, this has nothing to do with the deed of gift in suit and possibly explains the error into which the learned Subordinate Judge seems to have fallen. As I have said above, the point is well settled and is unarguable. There may be on occasions a serious question upon the point whether the gift could be described as religious or charitable at all. This question was not raised in this case; but it has been determined and it is obviously a most important question. The only question about which the reversioner need trouble himself is whether the quantum in proportion to the whole estate is excessive. I am satisfied that this suit was never launched on that basis at all and that the idea never occurred to the plaintiff. The defendant, who seems to have been fully advised as to his legal position, did in para. 8 of the written statement open the door to the contention. There is a suggestion that the plaintiff professed to attack the transaction on that ground in issue 7 as framed. I do not think that at the trial it was ever relied on at all. I think the quantum was treated as immaterial. There is a case decided by Mr. Karamat Husain J. in this Court in which he lays down (the case is not on all fours with this case) that it is unnecessary to find out the income and value of the property. I think the learned Subordinate Judge in this case laid that down at the instance of the plaintiff, the plaintiff knowing that he had no materials to establish the fact. At any rate the onus is upon the person having special knowledge of the alienated property. I do not propose to travel over the ground my learned brother has travelled. I think it is sufficient to say that in this case no suggestion of any kind is made even now at the 11th hour that the evidence shows anything approaching 3/16, and no authority of any kind has been quoted to us which discredits in any way the authority of 1826 in which it was held that 3/16 might be disposed of.

There is one further question, the 3rd question argued in support of this decree before us by Dr. Sapru, whether the lady understood and intended to carry out the terms of the deed. It is really covered by the uncontradicted evidence to which

I referred at the commencement of this judgment, and it is finally set at rest by the deposition which has been put in evidence sworn to by the lady in another suit in 1893. It is quite true that there is no evidence that this document was explained to her at the time and that she was made to understand it. It is difficult to see how there could be. In my experience of cases of this kind where a Pardanashin lady is concerned, certainly where the transaction is dubious, there is generally direct evidence of a number of people who shouted out the contents of the document to her. In this case the circumstances speak for themselves. The deed itself has a ring of genuineness about it. The simplest woman in the world would have no difficulty in understanding it as dealing with her own property if it was read to her at all, and 17 years afterwards, when advanced in years and suffering according to her own account from defective memory and embarrassment in appearing behind the Pardah before a large number of people, she was able to give a fair and honest account of the transaction. On that occasion she showed intelligence of a high order. She was asked an almost impossible question for anybody to answer, certainly for an owner of a large estate of this kind to answer, with reference to the profits of a village she had had nothing to do with for 17 years. "What is the profit of the village you gave?" Being behind the Pardah she wanted to know whether it was her own or her opponent's Pleader who was asking this question. I do not suppose that she was prepared to tell an untruth if it was her opponent's Pleader. She could have known nothing about the subject at all. What was passing in her mind was that it was an impertinent question. Her conduct on that occasion seems to me to be that of an intelligent and capable woman such as is described by the uncontradicted evidence. I am satisfied that this was as genuine a gift for religious purposes as any gift of the kind that was ever made. I agree in the order proposed by my brother.

By the Court.—The appeal is allowed, the decree and order of the Court below are set aside and the plaintiff's suit is dismissed with costs throughout.

V.B./R.K.

Appeal allowed.

A. I. R. 1918 Allahabad 49 (1)

RICHARDS, C. J. AND TUDBALL, J.

Hasan Ali Khan—Plaintiff—Appellant.

v.

Azharul Hasan and others—Defendants—Respondents.

Second Appeal No. 1255 of 1916, Decided on 26th July 1918, from decree of Sub. Judge, Allahabad.

Mortgagor and Mortgagee—Zamindar mortgaging sixteen annas interest in mahal without reservation—Mortgage includes grove holder's interest acquired by zamindar.

The owner of a sixteen annas mahal obtained decrees against certain persons who had certain rights in the mahal as grove-holders. In execution of these decrees he put up to sale the interest of the grove-holders and purchased it himself. Subsequently he mortgaged his entire interest in the mahal to the plaintiff without any sort of reservation.

Held: that the interest of the grove-holders acquired by the mortgagor merged in his estate as zamindar and was included in the mortgage. [P 49 C 2]

Peary Lal Banerji, B. E. O'Connor and S. A. Haidar—for Appellant.

Nihal Chand for W. Wallach and Hari-bans Sahai—for Respondents.

Judgment.—The facts connected with this appeal may be shortly stated as follows: One Ali Mazhar having become the owner of the sixteen annas mahal mortgaged the same to the plaintiff's predecessor. The mortgage is most comprehensive in its terms, the mortgagor purporting to mortgage his entire interest without any sort of reservation. A decree was obtained on foot of this mortgage. The property was sold and purchased by the plaintiff or his predecessor. The present suit is brought to recover certain fractional shares in three groves. It appears that prior to the mortgage, which we have mentioned above, Ali Mazhar obtained decree against certain persons who had certain rights as grove-holders. In execution of these decrees he put up to sale the interest (whatever it was) of the grove holders and purchased it himself. The argument put forward on behalf of the defendants is that this interest was an interest separate altogether from the zamindari and it did not form portion of the mortgaged property, and consequently did not pass to the plaintiff when he purchased under the mortgage decree. It seems to us that this contention is not sound. We have already mentioned that the acquisition of the grove-holders' interest was prior to the mortgage and we

1918 A/7 & 8

have referred to the terms of the mortgage deed. There was no reason of any kind why the interest of the grove-holders should not merge in the inheritance. Ali Mazhar was the sole owner of the sixteen annas mahal. At that time there was no reason why it would in any way be for the benefit of Ali Mazhar to keep outstanding the interest of the grove-holders. It is absolutely clear under the circumstances of the present case that the interest of the grove-holders, purchased and acquired by Ali Mazhar, merged in his estate as zamindar. Furthermore, the very terms of the mortgage deed are quite wide enough to include and comprehend every interest that he possessed at the date of the mortgage in the sixteen annas mahal which he sold. We allow the appeal, set aside the decree of the lower appellate Court and restore the decree of the Court of first instance with costs in all Courts.

V.B./R.K.

*Appeal allowed.***A. I. R. 1918 Allahabad 49 (2)**

TUDBALL AND ABDUR RAOOF, JJ.

Kishore Singh and others—Defendants—Appellants.

v.

Bahadur Singh and others—Plaintiffs—Respondents.

Second Appeal No. 1286 of 1916, Decided on 2nd July 1918, from a decree of Addl. Sub. Judge, Mainpuri.

(a) Jurisdiction—Civil and revenue—Revenue Court having exclusive jurisdiction—Its finding cannot be questioned in civil Court.

Where a Revenue Court has exclusive jurisdiction to try a certain question and it tries that question as between the parties, the finding arrived at by it is binding upon the parties and cannot be questioned in a civil Court.

[P 50 C 2]

(b) Agra Tenancy Act (1901), S. 167—Defendant suing in Revenue Court for ejectment of plaintiff alleging that latter was subtenant and obtaining decree—During pendency of suit plaintiff bringing civil suit for declaration that he was co-owner—Civil suit is not maintainable.

Defendant brought a suit in the Revenue Court to eject the plaintiff from certain fields on the ground that the latter was a subtenant, and obtained a decree. During the pendency of that suit the plaintiff brought a suit in the civil Court for a declaration that he was a co-owner of the occupancy right with the defendant and was not therefore liable to ejectment:

Held: that having regard to the provisions of S. 167, the suit in the civil Court was not maintainable. [P 51 C 2]

Laxmi Narayan Tiwari and Hari Bans Sahai—for Appellant.

N. C. Vaish—for Respondents.

Judgment. — This appeal arises out of a suit brought by the plaintiffs-respondents for a declaration that they were co-owners with the defendants, first, in a muafi holding and secondly, in an occupancy tenure. The Court of first instance granted a declaration in favour of the plaintiffs. We may point out that though the plaintiffs asked for a decree for joint possession, the Courts below held that they were in possession and so granted them a declaration only. The defendants have come to this Court on appeal, and the appeal is pressed only in respect to two plots Nos. 238 and 245 which form portions of the alleged occupancy holding. It was the defendants-appellants' case in respect to these two numbers that the plaintiffs were their subtenants. It was the plaintiffs-respondents' case that they were co-owners with the defendants of the occupancy tenure. In respect of these two numbers there are certain facts which have to be set forth. The defendants-appellants instituted a suit in the Revenue Court for the ejectment of the plaintiffs on the ground that the latter were their subtenants. To this suit the defendants relied that they were not subtenants but that they were co-tenants with the plaintiffs. That suit was instituted on 14th August 1915. While it was pending the plaintiffs brought the present suit in the civil Court. The Revenue Court was the first Court to come to a decision in regard to Nos. 238 and 245. It held that the present plaintiffs-respondents were the subtenants of the present appellants and were not the co-tenants. It therefore granted to the present appellants a decree for the ejectment of the present plaintiffs. Subsequent to that the civil Court came to its decision and gave the plaintiffs a decree for joint possession of all the land including these two numbers. That decision was upheld on appeal in the civil Court. From the decision of the Revenue Court no appeal whatsoever was preferred and that decision became final and binding between the parties.

The result therefore is the absurdity that a Revenue Court with competent and exclusive jurisdiction has granted a decree for ejectment which can be en-

forced in respect to these two numbers. The civil Court has given a decree for joint possession on the ground that the present plaintiffs are co-tenants and not sub-tenants. What the result is to be nobody can at present state. It is urged before us and with considerable force, specially in the face of a large number of rulings of this Court, that the decision of the Revenue Court as between the parties, to the effect that the plaintiffs are the subtenants in these two numbers of the defendants-appellants, is the decision of a competent Court with exclusive jurisdiction, that it is final and binding upon the parties and that the civil Court has no jurisdiction whatsoever to upset or reverse that decision. Reliance has been placed upon the decision of this Court in *Sheo Prakash v. Karna* (1), wherein it is remarked that the Revenue Court having made a decree for ejectment and that decree having been carried into effect and the plaintiff having been ejected, a suit in the civil Court is not maintainable. The decree of the Revenue Court was binding upon the parties and any decree made by the civil Court would be wholly nugatory. The point is covered by authority in the case of *Ram Dei v. Bindesri Upadhyaya* (2). The judgment of the learned Judge who decided that case was affirmed on appeal under the Letters Patent. In this case while a suit in the Revenue Court for the ejectment of Karna was pending and before that case was decided, Karna brought a civil suit out of which that appeal arose.

It was a suit which was brought in such form as would ordinarily make it cognizable by a civil Court. Its object was clearly to nullify the decree of the Revenue Court. That is also the case in the present suit. An ejectment suit in the Revenue Court had been brought and was pending and was about to conclude when this present civil suit was brought. It is true that the present civil suit was brought in the form in which a suit would be entertained only by the civil Court, but in so far as these two numbers were concerned, the suit was clearly one brought with a view of possibly nullifying the decision of the Revenue Court. We think that the principle which was applied in *Ram Dei*

(1) [1913] 35 All. 464=21 I. C. 2.

(2) [1911] 11 I. C. 267.

v. Bindesri Upadhyaya (2) applies equally to the present case before us. It was solely within the jurisdiction of the Revenue Court to hold that the present respondents were the subtenants of the present appellants and that as such they were liable to ejectment. Practically the same principle was applied in the case of *Ram Singh v. Girraj Singh* (3). There it was held that the Revenue Court in a case of ejectment had jurisdiction to go into a certain question and that decision was binding on the parties, and the Court in the civil suit was bound to look to the substance of the relief and not merely to the form of the suit, and that the civil suit was not maintainable as it was merely directed to the upsetting of the decision of the Revenue Court. In *Maharaja of Vizianagram v. Chango Kurmi* (4) a suit for ejectment of the defendant on the ground that he was a tenant-at-will was brought in the Revenue Court, which decided that he was a tenant but not a tenant-at-will of the plaintiffs, and subsequently a suit was brought in the civil Court for the ejectment of the defendant on the ground that he was a trespasser: it was held that the Revenue Court having determined the nature of the defendant's tenancy and the class to which he belonged, a suit in the civil Court could not be maintained.

It was equally in the present case that the Revenue Court has determined the nature of the defendant's tenancy and he is clearly liable to ejectment. The present suit is an attempt, as remarked in the judgment, to go behind the decision of the Revenue Court and ask the civil Court to do that which under S. 167 it is forbidden to do. On behalf of the opposite party, our attention has been called to two decisions of this Court, *Jagar Nath v. Ajudhya Singh* (5) and *Kanhi Ram v. Durga Prasad* (6). The former of these two cases may be distinguished from the present case. In that case there had been no decision by the Revenue Court on the question and Banerji, J., in his judgment, remarks as follows:

"It is true that the plaintiffs sued in the Revenue Court to eject the defendant on the al-

(3) A. I. R. 1914 All. 468 = 26 I. O. 791 = 37 All. 41.

(4) [1910] 6 I. O. 894.

(5) [1912] 85 All. 14 = 17 I. C. 876.

(6) A. I. R. 1915 All. 49 = 37 All. 223 = 27 I. C. 918.

legation that the defendant was their subtenant. Had the Revenue Court decided that question and held that the defendant was the tenant of the holding, there might have been some difficulty in the plaintiffs' way, but in this case, as pointed out by the lower appellate Court, the commissioner did not determine the question whether the plaintiffs were the tenants of the holding, or the defendant was so."

The case of *Kanhi Ram v. Durga Prasad* (6) is somewhat in favour of the respondents' contention. We would call attention to the opinion expressed by the late Sir Sundar Lal in his judgment on the point. He referred to *Chamier J.'s* decision in Second Appeal No. 1001 of 1911 and remarked:

"Like him I am inclined to think that the matter should be deemed to be *res judicata*."

In that suit the defendant brought a suit in the Revenue Court seeking for the ejectment of the plaintiff on the ground that the latter was his subtenant. The Revenue Court ordered ejectment. The plaintiff brought a suit in the Court for a declaration that he was the owner of certain occupancy holdings and claimed possession. He sued the opposite party on the ground that he was a trespasser. It has held in that case that the decision of the Revenue Court did not operate as *res judicata*. We do not propose to decide the present appeal on the question of *res judicata*. There have been a long series of rulings of this Court for a considerable length of time in which it has been consistently held that where a Revenue Court has exclusive jurisdiction to try a certain question and it tries that question as between the parties, that is a finding which is binding upon them and it is a finding which cannot be questioned in the civil Court, reference being made to S. 167, Ten. Act. We think that that is the principle which will govern the decision of the case before us. In so far as these two plots are concerned, there is a final and binding decision between the parties. The present respondents are the subtenants of the present appellants and a decree for their ejectment has been passed. We do not think that a civil Court is empowered to go behind that decision or to set it aside. We therefore allow the appeal in respect of these two numbers and in respect of them the plaintiffs' suit will stand dismissed with proportionate costs in all Courts. The rest of the plaintiffs' claim is not contested before us and the decree

of the Court below will stand in respect thereto.

V.B./R.K.

Decree modified.

A. I. R 1918 Allahabad 52

PIGGOTT AND WALSH, JJ.

Ram Faqir—Plaintiff—Appellant.

v.

Bindeshri Singh and another—Defendants—Respondents.

Second Appeal No. 1874 of 1916, Decided on 30th July 1918, from a decree of Offg. Second Addl. Subordinate Judge, Jaunpur.

(a) Appeal—Maintainability—Cross-appeals—Suit for possession of half-share in each of two groves in different villages—Suit in respect of one grove dismissed and decreed in respect of other—Appeal by both parties—Plaintiff's appeal dismissed, defendant's allowed, case being remanded—Plaintiff could appeal against order of remand.

Plaintiff brought a suit claiming possession of a half-share in each of two groves Nos. 2 and 123, situate in different villages. His suit was dismissed in respect of grove No. 2 and decreed in respect of grove No. 123. There were appeals both by the defendant and by the plaintiff. The latter's appeal was dismissed and the defendant's was allowed, the case being remanded. The plaintiff appealed to the High Court against the order of remand:

Held: that the failure of the plaintiff to appeal against the order, dismissing his own appeal to the lower appellate Court, did not debar him from appealing against the order remanding the suit in the defendant's appeal. [P 52 C 2]

(b) Civil P. C. (1908), S. 11, Expl. 2—Suit of small cause nature tried and decided as regular suit—Subsequent suit involving same question is *res judicata*.

Plaintiff brought a suit against the defendants to recover his share of the price of two trees cut down by the defendants, on the ground that he was entitled to a moiety share in the grove. The suit was one of the nature cognizable by a Court of Small Causes, but was instituted in the Court of the Munsif, who tried it as a regular suit and decided that the plaintiff was entitled to a half-share in the grove. In a subsequent suit by the plaintiff to recover possession of his half share in the grove:

Held: that under Expl. 2, S. 11, Civil P. C., the question of the plaintiff's title to a half-share in the grove was *res judicata*. [P 53 C 2]

Gokul Prasad—for Appellant.

S. M. Sulaiman—for Respondents.

Judgment.—In the suit out of which this appeal arises the plaintiff, who is the appellant in this Court, claimed possession of a half-share in each of two groves, together with damages. The groves are situated in different villages and may be described by the serial numbers in the village papers under which they are referred to in the judgments of the Courts below. One grove was num-

bered 123 and the other was numbered 2. The Court of first instance in substance dismissed the plaintiff's claim in respect of grove No. 2, but it decreed his claim for grove No. 123. There was an appeal by the plaintiff against the decree of the Court of first instance, in so far as that decree dismissed his claim for grove No. 2. There was also an appeal by the defendants against the same decree in so far as it allowed the plaintiff's claim for grove No. 123. The two appeals were heard together and a single judgment was written by which the questions raised in both the appeals were disposed of. Different decrees were passed. On the plaintiff's appeal the order was that this appeal be dismissed so that the decision of the Court of first instance, in so far as it was called in question by the plaintiff, was affirmed. On the defendants' appeal there was an order of remand arising out of certain pleadings and findings to be referred to presently. The appeal now before us is against the decision of the lower appellate Court on the appeal filed by the defendants against the decree of the Court of first instance. When this appeal came up for hearing before a single Judge of this Court, two preliminary objections were raised. One of these was well founded so far as it went, that is to say, the defendants-respondents, correctly urged that this appeal was not really a second appeal, but a first appeal from an order of remand, and should have been filed as such. This objection is of a technical nature and it has been disposed of by the referring of the appeal itself to a Bench of two Judges.

We have jurisdiction to hear this appeal under the rules of this Court and a mere misdescription of the appeal as "Second Appeal No. so and so" instead of "First Appeal from Order," does not affect the merits of the case or the jurisdiction of this Court. The appellant will not, in any event, be entitled to recover costs in excess of what he would have had to pay on a first appeal from order, but that matter can be considered when the decree of this Court comes to be prepared. The other objection was that the plaintiff was not entitled to appeal against this order of remand, or against any other order or decree which the lower appellate Court might have seen fit to pass on the defen-

dants' appeal unless he also appealed against the decision dismissing his own appeal about grove No. 2. Reliance is placed on a large number of authorities of this Court, out of which it is quite sufficient to refer to the decision in *Ram Lal v. Chhab Nath* (1), which is the foundation of the subsequent case law on the subject. The case now before us is clearly distinguishable from any of these. In the appeal brought by the plaintiff against the decision of the Court of first instance no question was raised, and none could be decided, as to the rights of the parties in respect of grove No. 123. The Court simply determined the question of the respective rights of the parties to grove No. 2. Its decision on this point was final; it proceeded upon findings of fact and no second appeal could have been brought against it with the slightest prospect of success. The plaintiff was bound to acquiesce in the decision against him so far as grove No. 2 was concerned, but there was nothing in the decree by which his appeal to the Court below stood dismissed, which in any way affected or purported to affect his rights in respect of grove No. 123. It is not even as if it could be contended that the plaintiff was injuriously affected by the dismissal of his appeal, because that dismissal left the decision of the Court of first instance intact. The plaintiff had a decision in his favour about grove No. 123 and the order passed upon his appeal left that decision where it was. That decision has only been disturbed by the order of remand passed upon the appeal of the defendants in the Court below, and against that order the present appeal lies. It is clearly not barred either by the words of S. 11, Civil P. C., or by any conceivable principle of res judicata.

We have now to consider the main point raised by the appeal itself, and for this purpose it is necessary to set out certain additional facts. In the year 1914 this same plaintiff had brought against these same defendants a suit in which he claimed damages amounting to Rs. 30, as his share of the price of two trees which the defendants had cut down in grove No. 123, on the ground that the defendants had appropriated the timber entirely to themselves in derogation of the plaintiff's rights as owner of a moiety

share in the grove. This suit was a suit of the nature cognizable by a Court of Small Causes; but it was not instituted in such a Court. Presumably there was no Court of Small Causes in existence at Jaunpur, and this suit for damages was instituted in the Court of the Additional Munsif and was tried by him as a regular suit. In reply to the plaintiff's claim the defendants denied his title to a moiety share, or to any other share in grove No. 123. There was an issue on this point and that issue was decided in favour of the plaintiff. After also determining the further issue raised as to the amount of damages, the Munsif proceeded to give the plaintiff in that suit a decree for Rs. 20.

Now in the present litigation the plaintiff once more sets up his title to the moiety share in grove No. 123. The suit has actually been brought in the very same Court which tried the suit of 1914, and the first issue for disposal is precisely the same issue as was tried out in the former suit, namely, the validity or otherwise of the plaintiff's claim to a moiety share in grove No. 123. The learned Additional Munsif held that he had himself once already decided this issue in a previous suit between the same parties, that decision operated as res judicata and the question could not be tried over again. This finding has been reversed by the learned Subordinate Judge on appeal. Holding that the question of title in respect of grove No. 123 was not res judicata in the plaintiff's favour by reason of the suit of 1914, that Court has remanded the case, so far as it concerned the plaintiff's claim to grove No. 123, for trial on the merits. The appeal being against this order of remand, what we have to determine is whether the decision in the suit of 1914 was or was not res judicata in the present litigation. On the wording of S. 11, Civil P. C., the case seems a clear one. The suit was between the same parties litigating under the same title. The same question was directly and substantially in issue in both the suits, and in the suit of 1914 it was decided in the plaintiff's favour by a Court competent to try the subsequent suit now under consideration by us in this appeal. As a matter of fact both the suits, as we have already pointed out, were brought in one and the same Court, that is to say, the Court of

(1) [1890] 12 All. 578.

the Additional Munsif of Jaunpur. The former was of a nature triable by a Court of Small Causes and the present suit is not. There is therefore this distinction, that in the suit of 1914 no second appeal would lie, whereas in the present suit a second appeal will lie, subject to the appropriate provisions of the law. Expl. 2, S. 11, Civil P. C., has been inserted in the present Act (5 of 1908), and it expressly provides that for the purposes of this section, the competence of a Court (that is to say, its competence to try any subsequent suit) shall be determined irrespective of any provisions as to a right of appeal from the decision of such Court.

This explanation would seem to have been expressly designed to set at rest the controversy sought to be raised on behalf of the present respondents. This view has been taken by a learned Judge of this Court in the only reported case we can find in which the question has been expressly considered and decided since the passing of Act 5 of 1908 namely, the case of *Musaddi Lal v. Jwala Prasad* (2). We have been referred to a number of older rulings of this Court, one of which is discussed by Chamier, J., in *Musaddi Lal v. Jwala Prasad* (2). All those decisions were passed before the second explanation to what is now S. 11, Civil P. C. had been enacted. It is quite true that, in order to apply the rule of res judicata at all, it must be found that the question of title was directly and substantially in issue in the suit of 1914. It has been contended before us that in some of the older decisions, as for instance in *Inayat Khan v. Rahmat Bibi* (3), in *Chet Ram v. Ganga* (4), it has been taken for granted that the decision of any Court in a suit of a Small Cause Court nature about a question of title should be regarded as merely incidental. In view of the change in the law effected by the passing of Act 5 of 1908, it seems unnecessary to discuss these older decisions. We find ourselves in entire agreement with the view taken by Chamier J. in *Musaddi Lal v. Jwala Prasad* (2), which was a case in all essential matters on all fours with the present one. It is worth noting that we have been referred to one other case of this Court decided

since the passing of the present Civil Procedure Code, namely the case of *Dulare Lal v. Hazari Lal* (5). That case is distinguishable from the present in one essential point. The suit for damages, the decision in which it was sought to plead as res judicata in a subsequent suit for the establishment of title, had been brought in a Court of Small Causes, and subsequently transferred to the Court of a Munsif.

It was pointed out that, under the provisions of the Provincial Small Cause Courts Act itself, a suit would not change its nature when it was transferred from a Court of Small Causes to that of a Munsif, but that it would be tried by the Munsif only as a Court of Small Causes. This is the reason given by the learned Judge of this Court for holding, in the appeal before him, the decision in the suit for damages would not operate as res judicata in the subsequent suit for establishment of title. In that case the suit for damages was instituted in and was, in the eye of the law, tried by a Court of Small Causes, that is to say, by a Court which, independently altogether of any provisions as to a right of appeal, would not be a Court competent to try a subsequent suit for title. We are of opinion therefore that the decision of the lower appellate Court on this question of res judicata was wrong and must be reversed. On this appeal therefore we set aside the order of remand which was passed on the appeal of the defendants in the Court below, and in lieu thereof we dismiss the appeal of the defendants to that Court. The plaintiff will be entitled to his costs in this and in the lower appellate Court, subject only to this qualification: that he will not be entitled to recover as costs in this Court anything more than he would have paid on a first appeal from order. It may be pointed out that the result of the order which we now pass is that the decree of the Court of first instance is restored in its entirety. There is no possible question of an appellate decision resulting in the existence of two inconsistent decrees on one and the same litigation each of them apparently capable of independent execution. We mention this fact as further illustrating our decision upon the preliminary objection.

V.B./R.K. *Appeal allowed.*

(5) A. I. R. 1914 All. 229=26 I. C. 56.

(2) [1912] 16 I. C. 496.

(3) [1878-80] 2 All. 97.

(4) [1886] A. W. N. 44.

A. I. R. 1918 Allahabad 55

ABDUR RAOOF, J.

Moyan Lal—Plaintiff—Petitioner.

v.

Tika Ram — Defendant — Opposite Party.

Civil Revn. No. 65 of 1918, Decided on 9th July 1918, from an order of Small Cause Court Judge, Bareilly, D/- 13th August 1917.

Limitation Act (1908), Art. 75—Instalment bond—Creditor having option to recover whole sum in lump on default of any instalment—Option not exercised—Suit for last three instalments is not barred.

An instalment bond provided that the money was to be repaid by five annual instalments and that if there was any default in payment of any of the instalments, the creditor would have the power to recover the entire amount in a lump sum. The bond was executed in 1909 and default was made in payment of the first instalment, but the plaintiff waited till the term provided in the bond had expired, when he brought a suit stating that his claim for the first two instalments being barred by time, he made a claim only with regard to the remaining three instalments.

Held: that under the terms of the bond the plaintiff had an option to waive his right to bring the suit at once on the happening of the first default, which right he had exercised and that therefore his suit with regard to the last three instalments was not barred. [P 56 C 2]

Sital Prasad Ghosh—for Petitioner.

P. M. Banerji—for Opposite Party.

Judgment.—This was a suit brought upon an instalment bond in the Court of the Judge of Small Causes. The bond was for Rs. 175 with interest and it was to be paid by five annual instalments of Rs. 35 each. The method provided for the payment of the instalments was in these words: As regards the payment of the money it is agreed that the said amount will be paid by instalments in five years. It was further provided that if there was any default in payment of any of the instalments, then the creditor would have the power to claim the entire amount in the lump sum:

“*Dayin mauzaf ho akhtiar hai ke kul rupia ek musht ba sharah sud fi sadi do rupia mah-wari tarikh tahrir tamasuk kaza so ba erjai nalish adalat diwani wasul kar lewe.*”

The document was written on 23rd February 1909. The first instalment would be payable, according to this bond, at the end of February 1910. It appears from the facts found by the Court below that nothing was paid on account of the first two instalments. The plaintiff then had a cause of action, if he so chose, to bring a suit at once for the recovery of the

whole amount due under the bond. He however did not choose to sue then. He has brought this suit after the term provided in the bond, and in para. 3 of his plaint he states that as the claim for the first two instalments is barred by time, he makes a claim only with regard to the remaining three instalments. The claim was resisted in the Court below on the ground of limitation. The questions for consideration in the Court below were whether under the terms of the instalment bond in suit the cause of action arose on the first default, and whether the plaintiff ought then to have brought the suit and whether by reason of the fact that he allowed the limitation period to elapse his entire claim was barred by time and it was not open to him to sue for the remaining instalments as being within time. The real question for decision however was whether under the terms of the bond the plaintiff had an option to waive his right to bring the suit at once on the happening of the first default and whether, as a matter of fact, he did exercise this right of waiver. On the face of the document there can be no possible doubt that he had such a right and his subsequent conduct shows that he did exercise it.

The learned Judge of the Court below has relied on the case of *Amolak Chand v. Baij Nath* (1) and has held that the plaints in the two cases were similar. The facts of that case however are clearly distinguishable from the facts of the present case. The facts of that case as stated at pp. 457 and 458 (of *I. L. R. 35 All.*) were these: The instalment bond was dated 5th July 1904, the whole amount was repayable in 4½ years in equal instalments of Rs. 75 payable every six months. There was a condition in the bond that if any instalment remained unpaid on the due date, then the creditor would be entitled to recover the whole sum at once with interest or that he might sue for each instalment as it fell due and remained unpaid. The first two instalments were paid on the due dates, the third instalment was due on 7th January 1906. Neither this nor any of the subsequent instalments were paid. On 17th August 1912, i. e., six years and seven months after 7th January 1906, the plaintiff brought the suit. An examination of the plaint showed

(1) [1913] 35 All. 455=20 I. O. 939.

that the plaintiff sued to recover the full amount which was due on 7th January 1906 together with interest which fell due by reason of the default of 7th January. In his plaint he distinctly stated that the cause of action for the suit accrued on 7th January 1906. On these facts the learned Judges held that the plaintiff in that case had elected to take one of the two options given him by the bond, viz. that one which entitled him to recover the full amount of the debt due by reason of the default in one instalment. They went on to say:

"It is perfectly clear from the plaint itself that the plaintiffs have not waived that right, which entitled them to recover the whole of the balance due by reason of the default of 7th January 1906. In fact they take their stand upon that provision and seek to enforce their right. The existence of a waiver is distinctly negatived by the plaint, which states that the right accrued on 7th January 1906. To enforce that right they had six years from that date."

In the present case the plaintiff in distinct terms states that his claim as to the first two instalments was barred by time and that his suit related only to the three remaining instalments. He does not base his cause of action on the default of payment of the first instalment. He does not claim the entire amount due under the bond. He has no doubt claimed interest on the amounts due with respect to the two first instalments. But having regard to the cause of action stated in the plaint, he is not entitled to claim such interest. The learned Judges in the case mentioned above distinguish the case before them from the case of *Ajudhia v. Kunjal* (2) in these words:

"In regard to the ruling in *Ajudhia v. Kunjal* (2) an examination thereof shows clearly that it cannot apply to the facts of the present case. That suit was brought to recover the last three of the instalments that were due under that bond, and not the whole amount due by reason of a default in payment of an instalment. It appears to have been proved or assumed that the plaintiffs had forborne to sue; in other words, had waived their rights in respect of the instalments that were due and had not been paid."

These remarks make the case of *Ajudhya v. Kunjal* (2) fully applicable to this case. The facts of the present case and those of *Ajudhia v. Kunjal* (2) are almost parallel. The case of *Chandan Singh v. Bidha Dhar* (3) is also distinguishable from the present case. Cha-

mier, J., distinguished the case before him from the case of *Ajudhia v. Kunjal* (2) upon the ground that the bond before him provided that in default of payment of any instalment, the debtor was bound to pay the whole amount at once. He held that that circumstance distinguished the case from *Ajudhia v. Kunjal* (2). The same reasoning is equally applicable in this case. In my opinion the learned Judge of the Court below did not correctly appreciate the terms of the bond in suit. The suit was within time and it ought not to have been dismissed as being barred by time. I allow this application, set aside the judgment and decree of the Court below and remand the case to that Court to be restored to its original number on the file and to be disposed of on the merits. The costs to abide the event.

V.B./R.K. *Application allowed.*

A. I. R. 1918 Allahabad 56

PIGGOTT, J.

Mathura and others—Accused—Applicants.

v.

Emperor—Opposite Party.

Criminal Revn. No. 394 of 1918, Decided on 3rd August 1918, from an order of Dist. Magistrate, Farrukhabad.

Criminal P. C. (1898), Ss. 15, 16 and 350—Rules framed by U. P. Government under S. 16 held to be *intra vires*—Trial before Bench of Magistrates—Judgment by Bench other than Bench hearing evidence is illegal.

The rules framed by the United Provinces Government under S. 16 provided that in the case of Benches consisting of not more than three members, any two of the members shall form a quorum. It was also provided that if a Bench held an adjourned sitting for the disposal of part-heard case and the members at the adjourned sessions were not the same as sat at the first hearing of the case, the provisions of S. 350 would be held to apply to the case:

Held: (1) that the rules were *intra vires* the Government. [P 58 C 2]

(2) That the effect of the rules was that any trial commenced before any two members of a Bench could lawfully be continued before any other two members, provided that if exception was taken by the accused to the proceeding before a differently constituted Bench, the trial must either be recommenced *de novo* or adjourned to a subsequent date on which the same Magistrates who commenced the trial might find it convenient to sit together. [P 59 C 1, 2]

At the first hearing of a case before a Bench of Magistrates the evidence for the prosecution was recorded. At the second hearing one of the Magistrates was replaced by another, who was not present at the first hearing, but the accused having stated that they had no objection to the trial

(2) [1908] 30 All. 123.

(3) [1912] 15 I. C. 856.

being proceeded with the trial was concluded and on a subsequent date judgment was pronounced by the Bench before which the trial had commenced:

Held: that one of the Magistrates who delivered the judgment being absent on the date of the second hearing it could not be said that the accused were not prejudiced, and that therefore the proceedings at the last hearing, when judgment was pronounced, were illegal and must be set aside. [P 60 C 1]

Peary Lal Banerji—for Applicants.

R. Malcomson—for the Crown.

Judgment.—In this case the three applicants, Mathura, Gangadin and Jaganath, have been convicted of an offence under S. 13, Gambling Act 3 of 1867. The one and only question raised by this application is whether the trial of the applicants was or was not vitiated by any illegality or material irregularity in connexion with the constitution of the Court which tried them for this offence. The Court in question was a Bench of Honorary Magistrates sitting at the town of Kaimganj. I find that the Local Government, in the exercise of the powers conferred upon it by S. 15, Criminal P. C., had appointed three gentlemen, Mr. Jan Alam Khan, Mr. Nazir Ali Khan and Pandit Chaube Peary Lal, to be a Bench of Magistrates exercising jurisdiction in this particular place. It is not denied that the offence of which the applicants were tried was one within the jurisdiction of the aforesaid Bench, or that the sentence passed was one within the competence of the said Court. The point taken is as follows:

There were three hearings of this case in the trial Court. On 5th December 1917 the case was taken up by Mr. Nazir Ali Khan and Mr. Jan Alam Khan and the evidence for the prosecution was recorded. On 16th December 1917, when the Court resumed its sitting for the trial of this case, there were present on the Bench Mr. Jan Alam Khan and Pandit Chaube Peary Lal. The accused were asked to state whether they desired this Bench to recommence the trial *de novo*, or rather, I should say, that they were asked whether they would like to have the trial adjourned until the same two Magistrates who had commenced the trial should find it convenient to sit together again. The precaution was taken of obtaining from the accused a written petition, in which they stated that they had no objection to the hearing of the case proceeding before the Bench as then con-

stituted, and added that they particularly desired that there should be no delay in the disposal of the case. I understand that at the end of the hearing of 16th December 1917 the evidence had been completely taken, the accused had been examined and arguments had been heard. Nothing was left to be done except for the Court to pronounce judgment. The record does not make it quite clear why, under these circumstances, an adjournment of five days was ordered, but I am inclined to suspect that this was done under a bona fide belief that the proceedings would be more regular if judgment in the case were pronounced by the same two members of the Bench of Magistrates who had commenced the trial.

It is admitted that on the 21st December no objection was taken on behalf of the accused persons to the action of Mr. Nazir Ali Khan and Mr. Jan Alam Khan in proceeding to pass judgment. As bearing on the legality of these proceedings it requires to be noted further that, under S. 16, Criminal P. C., the Local Government, or subject to the control of the Local Government, the District Magistrate is empowered to make rules for the guidance of the Magistrates' Benches in respect of various subjects, including amongst others the constitution of the Bench for conducting trials. The Local Government of these Provinces has issued for general information a set of draft rules and these have been generally adopted under the authority of the Magistrates of various districts. It is not suggested that these rules are not in force in the district of Farrukhabad. Indeed I understand from the orders of the District Magistrate and of the learned Sessions Judge on this record that the said rules are undoubtedly in force. Now under the second of these rules, it is laid down in respect of a Bench consisting of not more than three members, that any two of these shall form a quorum. In the next rule it is provided that, if the Bench holds an adjourned sitting for the disposal of a part-heard case, and the members at the adjourned sessions are not the same as sat at the first hearing of the case, the provisions of S. 350, Criminal P. C., will be held to apply to the case. The present applicants have brought the question of the legality of their trial to the notice of the District Magistrate in

appeal and have also laid it before the Sessions Judge in revision. Both these Courts have expressed the opinion that the proceedings of the Bench of Honorary Magistrates were justified under the rules above referred to and that the trial was, under the circumstances, a perfectly legal one. I have been referred to various decisions of the Calcutta and Madras High Courts, of which the most important is that of *Hardwar Singh v. Khega Ojha* (1). In that case the learned Judges of the Calcutta High Court laid it down very broadly that an Honorary Magistrate may not give judgment and pass sentence in a case unless he has been a member of the Bench during the whole of the hearing of the case. The attention of the Hon'ble Judges had been drawn to a rule framed by the Local Government of Bengal, purporting to make the provisions of S. 350, Criminal P. C., applicable to a case like the one now in question, but they held that this rule was ultra vires not being justified by anything in the provisions of S. 16, Criminal P. C. The Madras High Court has in two reported cases adopted the same principle. I have seen the rules framed by the Local Governments of Bengal and of Madras under S. 16 aforesaid, and I may say at once that these rules differ in one material particular from those framed by the Local Government of these Provinces. They contain nothing similar to the direction given by R. 2 of the rules framed under the orders of our Local Government, by which any two members of a Bench of Honorary Magistrates consisting of three members shall form a quorum. As to the meaning of that expression there can, I conceive, be no room for doubt.

In the case of any Board of Directors or other Committee, if there is a rule providing that so many members of the said Board or Committee shall form a quorum, the meaning of the rule is that, as soon as the requisite number of members is gathered together, the entire authority of the said Board or Committee vests in the quorum so assembled, and obviously this authority extends to the transaction of business adjourned from a previous meeting as well as to the taking up of fresh business. The first question then about which there must be a definite decision is whether a rule directing that

any two members of a Bench of Honorary Magistrates consisting of not more than three members shall form a quorum, is one which the Local Government was entitled to make, or to cause to be made, under S. 16, Criminal P. C. As a mere matter of judicial interpretation it seems to me that such a rule clearly falls under S. 16, Cl. (c), Criminal P. C., being covered by the words: "the constitution of the Bench for conducting trials." When the Local Government appointed the three gentlemen already mentioned to be a Bench of Honorary Magistrates exercising certain powers within the limits of the town of Kaimganj, the inference would be, in the absence of any rule or order to the contrary, that the Bench would not be properly constituted unless all three of the gentlemen named were present at each and all of its sittings. The Local Government regarded this as inconvenient and was of opinion that, for the convenience of the public, the work which it desired the Bench of Magistrates at Kaimganj to carry out could best be performed by appointing three Magistrates and then empowering any two of them to sit together as a complete Court for the trial of cases, or the transaction of other business. I repeat that, in my opinion, it was within the competence of the Local Government to pass orders to this effect under the provisions of Ss. 15 and 16, Criminal P. C.

I have now to consider what would be the result if the Local Government had issued no further directions for the guidance of this Bench of Magistrates. In my opinion the consequence would be that any trial commenced before any two members of this Bench could lawfully be continued before any other two members. The learned Judges of the Calcutta and Madras High Courts had no such rule before them as that which I have quoted regarding the number of Magistrates necessary to form a quorum, and the decisions pronounced by them are therefore of no direct application to the present case. In saying this I do not wish to ignore the fact that on the principles laid down in the case of *Hardwar Singh v. Khega Ojha* (1), it would be difficult to accept the proposition that the legislature intended to empower the Local Government to pass any orders the effect of which would be as above stated.

(1) [1893] 20 Cal. 870.

I think that the learned Judges of the Calcutta High Court assumed, as a sort of major premise underlying the whole of their decision, that there was something repugnant to natural justice in the suggestion that the presiding officer of any Court should pass any final decision in a criminal trial, except upon evidence the whole of which had been tendered in his presence and heard by himself personally. I can only say that this proposition seems to me a very arguable one, and that under the Indian system of criminal procedure the exceptions to this rule seem to me to outnumber the instances. I must admit therefore that I do not find myself able to approach the consideration of the question quite from the same point of view as that taken by the learned Judges of the Calcutta High Court.

At the same time I have endeavoured to discuss, as a pure question of law, the question whether Ss. 15 and 16, Criminal P. C., read together, do or do not authorize the Local Government to make rules, the effect of which would be that any two Magistrates out of a Bench of three or more should constitute a quorum for the transaction of all business and the hearing of all cases lawfully coming before such Bench for disposal, including the further hearing of a criminal trial adjourned from a previous sitting. For the reasons stated I have come to the conclusion that the Local Government is so empowered and that the rules under which this Bench of Honorary Magistrates was constituted were perfectly legal. If I am right so far, then the question of the competence of the Local Government to make the further rule directing Magistrates' Benches, under specific circumstances, to be guided by the provisions of S. 350, Criminal P. C., requires to be discussed on a wholly different basis from that adopted in the decisions of the Calcutta and Madras High Courts. It becomes an exception in favour of accused persons, engrafted by the Government rules upon the general direction that any two members of a Bench of three Magistrates shall, for all purposes, form a quorum. In practice it amounts to nothing more than this: that the Local Government directs the Bench of Magistrates in question, if it should find it is sitting to take up an adjourned trial with a Bench differently constituted

from that which commenced the trial of the case, and exception is taken on behalf of the accused to the trial proceeding under such circumstances, then either to recommence the trial *de novo*, or to adjourn it to a subsequent date on which it may be found convenient for the same two Magistrates to sit who had commenced the trial of the case. It is in fact a direction to Benches of Honorary Magistrates that, under certain circumstances, they are to refrain, at the request of the accused, from exercising a power which would otherwise be theirs. Looked at in this way I think that the rule was one within the competence of the Local Government. If I were to hold the contrary it certainly would not help the applicants in the present case. It is merely an exception engrafted by the Local Government upon the rule which it had previously made regarding the constitution of the Bench for conducting trials.

Having said this I now come to the consideration of what took place in this particular case. I have not the slightest hesitation in holding that the proceedings of 16th December 1917 were regular and proper and within the competence of the Bench of Honorary Magistrates. Strictly speaking, this proposition is not challenged by the petition in revision which lies before me for disposal. What the petitioners object to is the procedure followed on 21st December 1917 when two Magistrates, one of whom had not heard the cross-examination of the prosecution witnesses or the defence evidence, proceeded to dispose of the case. To the contention of the applicants on this point the Courts below have in substance replied that it was for the accused persons to object on 21st December 1917, when Mr. Nazir Ali Khan and Mr. Jan Alam Khan took their seats upon the Bench to pass judgment in this case. Technically the opinion expressed by the District Magistrate and by the learned Sessions Judge on this point is in accordance with the wording of the prov. 1, S. 350, Cl. (1), Criminal P. C.; but it is important that District Magistrates and this Court also should not overlook the second proviso to the same subsection. It does not matter whether the accused did or did not object to the constitution of the Bench on 21st December 1917; nor is it necessary for the Court to consider whether they had a reasonable opportunity

of doing so, whether they may not have been taken by surprise, whether judgment may not have been pronounced under such circumstances as left them no convenient opportunity of entering a protest.

The real question is whether the accused persons were prejudiced by the procedure adopted on 21st December 1917. A question such as this is one which the Court can only examine with reference to the general circumstances of each particular case. Ordinarily speaking, one would be inclined to hold that it is prejudicial to an accused person that judgment should be passed against him by a Magistrate who has only heard the prosecution witnesses examined in chief, and was not present at their cross-examination or at the hearing of the defence evidence. So far as the record before me goes, I cannot feel certain that Mr. Nazir Ali Khan had himself perused the entire record of the cross-examination of the prosecution witnesses and the depositions of the witnesses for the defence. He most probably did so; but he may have accepted his learned colleague's account of what had taken place at the sitting of 16th December. Moreover, although I am reluctant to refer to a matter of this sort, I cannot altogether shut my eyes to the fact that the accused persons are all Hindus, and that the case was one of such a nature that these accused persons may well feel that it was an advantage to them to have a Hindu gentleman present on the Bench when the matter was finally disposed of, specially when the question of sentence was being considered. I think therefore that the Honorary Magistrates in this case committed an error of judgment when they did not proceed to dispose of the case on 16th December, and I am not prepared to say that the accused may not have been prejudiced by the procedure followed at the final hearing of the case.

Under these circumstances the order which I pass is that the proceedings of 21st December 1917 be set aside, the conviction and sentence be quashed, and that the case be returned to the same Bench of Honorary Magistrates to be disposed of from that stage at which in my opinion, an error was committed. In effect my order is that the two Magistrates who presided at the hearing of 16th December 1917, namely, Mr. Jan

Alam Khan and Pandit Chaube Peary Lal, do proceed to consider their decision in this case and to prepare a judgment and deliver the same in due course of law. The record is returned with the above directions.

V.B./R.K.

Record returned.

A. I. R. 1918 Allahabad 60

RICHARDS, C. J. AND TUDBALL, J.

Bhagwati—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 459 of 1918, Decided on 31st July 1918, from an order of Addl. Sess. Judge, Allahabad.

Criminal P. C. (1898), S. 512—Evidence taken against absconding persons—Evidence showing that there was no immediate prospect of their arrest—Magistrate stating that evidence was taken under S. 512—Presumption is that Magistrate did his duty and that evidence was not recorded unlawfully, although he did not recite finding that there was no immediate prospect of arrest.

Where a Magistrate had clear evidence that the accused were absconding and evidence from which he might reasonably infer that there was no immediate prospect of their arrest, and he expressly stated in his order that he was taking evidence under S. 512, the presumption is that he did his duty and did not record the evidence under the section unlawfully. The mere fact that the Magistrate did not recite a finding that there was no immediate prospect of the arrest of the accused does not render the evidence inadmissible. [P 61 C 2]

C. R. Alston and Peary Lal—for Appellant.

R. Malcomson—for the Crown.

Judgment.—The accused in this case has been found guilty of murder and sentenced to transportation for life. The alleged murder took place as far back as 24th June 1904. A trial took place in respect of this murder in the year 1904 and one Khedu was convicted. He was sentenced in the first instance to transportation for life, but that sentence was subsequently enhanced by the High Court to a sentence of death. The present accused was arrested on 8th February 1918 at Madras. He was put upon his trial and convicted and sentenced to transportation for life. The depositions of three witnesses were used as evidence against him. All these three persons were dead. Mr. Ross Alston, on behalf of the appellant, has raised the point that these depositions were not admissible. The Magistrate in the year 1904 took the evidence of these witnesses having previously made the following order:

"I find that Mahabir and Bhagwati have absconded. The evidence which I am about to take will be regarded as taken under S. 512, Criminal P. C., as regards Mahabir and Bhagwati."

The point raised by the learned counsel is that the omission in the order of an express finding that there was no immediate prospect of arresting the two persons, renders the evidence inadmissible. In support of this contention the case of *Rustam v. Emperor* (1) has been quoted. In that case a person was put upon his trial some time after an offence had been committed. The evidence of certain witnesses, who had been examined previously, was admitted at the trial. The evidence, it seems, purported to have been taken under S. 512. At p. 31 of *I. L. R. 38 All.* the learned Judges say:

"The learned counsel for the appellants contends that the said evidence is inadmissible, inasmuch as no proof of the absconding of the accused had been formally received and recorded prior to the examination of the said witnesses. We think that this objection is valid and must prevail. In S. 512 it is distinctly laid down that if it is proved that an accused person has absconded and there is no immediate prospect of arresting him, the Court competent to try or commit for trial such person for the offence complained of may, in his absence, examine the witnesses (if any) produced on behalf of the prosecution and record their depositions. It is clear from the language of the section that the Court which records the proceedings under it, must first of all record an order that in its opinion it has been proved that the accused has absconded and that there is no immediate prospect of his arrest. No such finding appears on the file of 1897; in fact no evidence has taken in that year to show that the present appellant was absconding and that there was no immediate prospect of his arrest. The evidence of 1897 being inadmissible, the conviction of the appellant on the basis of such evidence cannot stand."

It would seem from this passage that the learned Judges looked at the file of the previous trial and found that there was no evidence from which the Magistrate could draw the inference that the accused was absconding and that there was no immediate prospect of his arrest. In the present case we find that a witness was examined who proved that the accused were absconding, and from his evidence the Magistrate might most reasonably have inferred that there was no immediate prospect of their arrest. In the evidence as recorded by the Magistrate the witness actually said that the accused had absconded and that there was no prospect of arresting them and that action under Ss. 87 and 88 had been

(1) A. I. R. 1915 All. 411=38 All. 29=31 I. O. 817.

taken by the Court. In the passage we have quoted the learned Judge who delivered the judgment says:

"It is clear from the language of the section that the Court which records the proceedings under it must first of all record an order that in its opinion it has been proved. . . ."

The section nowhere says that the Magistrate must record a finding. We wish to make it quite clear that in our opinion a Magistrate before recording evidence under S. 512 ought to be satisfied that the accused is absconding and that there is no immediate prospect of his arrest, and it is certainly advisable that he should recite in his order that he finds this to be the case. However in this case we find that the Magistrate had clear evidence that the accused were absconding, and evidence from which the Magistrate might reasonably infer that there was no immediate prospect of their arrest. In his order he expressly states that he is taking the evidence under S. 512. The presumption is that the Magistrate did his duty and did not record the evidence under S. 512 unlawfully. In our opinion the mere fact that the learned Magistrate did not recite a finding that there was no immediate prospect of the arrest of the accused does not render the evidence inadmissible. In the present case neither of the accused were very promptly arrested. One was only arrested in the present year and the other is still absconding. We think that the evidence was clearly admissible. Once we decide this point, we see no reason whatever to differ from the conclusion arrived at by the Court below. The evidence was believed at the original trial and there is no reason to doubt it. We dismiss the appeal.

V.B./R.K. *Appeal dismissed.*

- A. I. R. 1918 Allahabad 61

PIGGOTT AND WALSH, JJ.

Raushan Lal and others—Appellants.

v.

Kanhaiya Lal & others—Respondents.

Second Appeal No. 1652 of 1916, Decided on 1st August 1918, from decree of Dist. Judge, Agra.

Limitation Act (1908), S. 20—Mortgage—Payment of interest saves limitation also against subsequent purchaser of equity of redemption or subsequent mortgagee of portion of property.

A payment of interest due on a mortgage made by the mortgagor saves limitation under S. 20 not only as against the mortgagor, but also as

against a subsequent purchaser of a portion of the equity of redemption or a subsequent mortgagee of a portion of the mortgaged property.

[P 62 C 2]

Nehal Chand for *B. E. O'Connor* and *Tej Bahadur Sapru*—for Appellants.

Narain Prasad Asthana and *Surendra Nath Sen*—for Respondents.

Piggott, J.—The essential point for determination in this second appeal lies within a narrow compass. The plaintiffs sued to enforce a simple mortgage of 8th January 1891. They impleaded the mortgagors as defendants first party, one set of subsequent mortgagees as defendants second party and the present appellants, as purchasers of a portion of the equity of redemption, as defendants third party. The defendants of the first and second parties do not contest the suit, at any rate at this stage. The defendants third party contend that the claim is barred by limitation. *Prima facie* this suit instituted on 7th November 1914 would be well outside the prescribed period of limitation for a suit on a simple mortgage of 8th January 1891. The plaintiffs' case is that limitation is saved under S. 20, Limitation Act (9 of 1908) by three payments on account of interest as such; the last of these payments is of a sum of Rs. 800 made on 25th November 1902. This payment is proved beyond doubt. It was made by means of a sale by the mortgagors to the prior mortgagees of certain property other than that hypothecated in the simple mortgage-deed in suit. The consideration for the sale was sum of a Rs. 800.

There was an express acknowledgment that on that date, namely, 25th November 1902, a sum of Rs. 1,400 was due as interest on the deed of 8th January 1891; in order to pay off a portion of this interest the property specified in the deed of 25th November 1902 was sold for a sum of Rs. 800 and the entire consideration was set off in part payment of the interest as above stated. The present suit is within limitation from 25th November 1902 and it is not denied that S. 20, Limitation Act, would apply as against the mortgagors themselves. The contention is that the provisions of that section cannot be applied so as to save limitation as against these appellants, who are subsequent purchasers of a portion of the equity of redemption. The

appellants brought under a sale deed of 24th June 1913, a portion of the property hypothecated under the plaintiffs' mortgage of 8th January 1891, along with certain other property with which of course this suit is not concerned. They paid the sum of Rs. 9,000, a large part of which was due to them on account of previous transactions between themselves and their vendors. They undertook however to pay off a certain older mortgage of the year 1911, which again seems to have been executed in satisfaction of an older mortgage of 1905, by which again a still older mortgage of 21st December 1899 was paid off; and under this mortgage a portion of the property now in suit was hypothecated.

The appellants contend before us that they occupy two positions. They are not merely purchasers of a portion of the equity of redemption under their deed of 24th June 1913, but they are also entitled to stand in the shoes of the mortgagees under the deed of 23rd December 1899. Even this mortgage however is subsequent in date to the mortgage in suit, so that the real question for determination, namely, whether the payment of interest effected by the deed of 25th November 1902, does or does not save limitation as against these appellants, has to be determined upon the wording of S. 20, Limitation Act, on substantially the same principles, whether we deal with these appellants as purchasers of the equity of redemption or as subsequent mortgagees in respect of a portion of the property in suit. We have not been referred to any reported case of this Court, but in the Calcutta High Court there is a good deal of authority and this authority seems to us, as to the learned Judge of the Court below, very strongly in favour of the plaintiffs-respondents. The important cases are *Krishna Chandra Saha v. Bhairab Chandra Saha* (1) and *Domi Lal Sahu v. Roshan Dobay* (2). In each of these cases the transaction pleaded as extending the period of limitation was a payment on account of interest. Now on behalf of the appellants strong reliance has been placed on another case of the same Court decided a little before either of the two cases reported above. This is the case of *Surjiram Marwari v.*

(1) [1905] 32 Cal. 1077.

(2) [1906] 33 Cal. 1278.

Barhamdeo Persad (3) to be found in Vol. 1 of the Calcutta Law Journal Reports at p. 337.

The question there was of an acknowledgment by the mortgagor as saving limitation against a subsequent mortgagee. The learned Judges who decided that case relied partly on the wording of S. 19, Limitation Act, and partly on an English case, that of *Bolding v. Lane* (4). That case was itself discussed shortly afterwards before the House of Lords in a case referred to in the subsequent Calcutta decisions, namely, the case of *Chinnery v. Evans* (5). The case of *Bolding v. Lane* (4) was not dissented from in *Chinnery v. Evans* (5), but it was distinguished against and explained. And it is quite clear that a distinction was drawn between the effect of a payment and the effect of a mere acknowledgment. This point has been very clearly brought out in another decision of the Privy Council, on appeal from the Supreme Court of Canada, in the case of *Lewin v. Wilson* (6). The words of Lord Hobhouse at p. 645 of that report are worth quoting :

"It must be remembered that payment and acknowledgment are two very different things. As regards the person making them, acknowledgment may, as pointed out in *Bolding v. Lane* (4), be made by a person who, though a party to the mortgage contract, has ceased to have any substantial interest in it, and has nothing to lose by the acknowledgment; whereas payment is certain to be made only by those who have some duty or interest to pay. As regards the recipient, so long as he is paid according to the intention of the contracting parties, he is in full enjoyment of his bargain and is not put upon any further assertion of his rights; but not so if he only receives acknowledgment. If therefore we find that the legislature has used different language about the two cases we must not readily conclude that it has done so by accident or without meaning it."

This is probably the reason why the decision in *Surjiram Marwari v. Barhamdeo Persad* (3), although referred to in argument, was not discussed by the learned Chief Justice of the Calcutta High Court when deciding the case of *Krishna Chandra Saha v. Bhairab Chandra Saha* (1). He felt that he was dealing with a different section of the statute, and that a decision based upon S. 19, Limitation Act, whether correct or not, was not necessarily an authority

on a case which turned on the wording of S. 20 of the same Act. We have been referred to one or two other decisions substantially to the same effect, but we think that on the authorities and on the wording of S. 20, Limitation Act, the decision of the Court below was clearly right and that this appeal must fail. It may be that the mortgagors dealt unfairly with these appellants on 24th June 1913, when they conveyed certain property to the latter without stating that a portion of this property was also subject, along with other property, to a simple mortgage of the year 1891 which was still in force. But it is to be noted that in the sale deed above referred to in favour of the appellants there is no definite statement on the part of the vendors that the property which they are conveying is subject to no charge other than those specified in the deed itself, still less is there any express covenant of title or of indemnity. The question however of the rights and liabilities inter se of these appellants and their vendors, the persons impleaded as defendants first party in this suit, is not before us. The question is whether anything which took place between these parties in the year 1913, can affect the rights of the present plaintiffs in respect of their mortgage deed of 8th January 1891. If the question is put in this way it seems clear that the answer must be in the negative. The suit as brought is not barred by limitation, time being saved by the payment on account of interest effected by the sale of 25th January 1902. This appeal therefore fails and we dismiss it with costs.

V.B./R.K.

Appeal dismissed.

A. I. R. 1918 Allahabad 63

RICHARDS, C. J. AND BANERJI, J.
Mukat Lal—Plaintiff—Appellant.

v.

Gopal Sarup — Defendant — Respondent.

First Appeal No. 233 of 1916, Decided on 28th November 1918, from decree of Dist. Judge, Meerut.

Limitation Act (9 of 1908), Art. 2—Execution of decree—Court officer improperly holding sale—Suit for damages is governed by Art. 2.

Plaintiff's property having been advertised for sale in execution of a decree he tendered the amount of the decree to the defendant, who was the Court Amin and whose duty it was under O. 21, R. 63, Civil P. C., to receive the money and

(3) [1905] 1 C. L. J. 337.

(4) [1863] 1 De. G. J. & S. 122.

(5) [1864] 11 H. L. C. 115.

(6) [1886] 11 A. C. 689 (P.C.).

not to proceed with the sale. The defendant however refused to accept the money and proceeded to hold the sale. The plaintiff brought a suit for damages against the defendant:

Held: that the basis of the suit being that the defendant had refused to accept the money which he was bound to accept under the provisions of the Civil Procedure Code or that he had improperly held a sale purporting to be under the provisions of the Code, the suit was governed by Art. 2. [P 64 C 2 P 65 C 1]

Sital Prasad Ghosh—for Appellant.

Kailash Nath Katju - for Respondent.

Judgment.—This appeal arises out of a suit in which the plaintiff claimed damages against the defendant on certain allegations which are set forth in the plaint. They are as follows: There was a decree out against the plaintiff for a small sum of Bs. 205-13-0. The defendant was the Court Amin, whose duty it was to sell the plaintiff's property in execution of the decree. The plaintiff alleges that on the day of the sale he tendered the amount of the decree to the defendant, whose duty it was under O. 21, R. 69, to receive the money and not proceed with the sale. The plaintiff goes on to allege that the defendant, being a friend of the decree-holder, refused to accept the money and proceeded with the sale, the result being that the plaintiff had to deposit the full purchase money which the auction-purchaser had bid for the property together with 5 per cent. as a condition precedent to getting the sale set aside. The defendant denied that the plaintiff had tendered him the money (and it does seem a little strange that the plaintiff would have allowed the property, which he alleges to be worth about Rs 5,000, to be attached and advertised for sale sooner than discharge a decree for a trivial sum). However these questions have not been gone into in the Court below. The learned District Judge, instead of allowing the case to be tried by the Munsif, took it on his own file because the conduct of a Court official was being challenged by the suit. We think his action in this respect was quite correct. The learned Judge held that the suit was barred by Art. 2, Lim. Act. That article provides a period of limitation of ninety days for suits brought for 'compensation for doing or for omitting to do an act alleged to be in pursuance of any enactment in force for the time being in British India.'

In the present case if the act of the defendant complained of be the alleged refusal to accept the money due on foot

of the decree, the suit is based on the allegation that the defendant omitted to do an act which it was his duty to do under one of the provisions of the Code of Civil Procedure, namely, to receive the decretal money before sale. If on the other hand the act complained of be the proceeding to sell the property, again there can be no doubt that the complaint is that the defendant did an act purporting to be under the Code but improperly, namely, to sell the property after the decretal amount had been tendered. The learned District Judge dismissed the plaintiff's suit as barred by Art. 2, Lim. Act (it being admitted that the suit was not brought within ninety days of the alleged act of the defendant). As a matter of fact the suit was not instituted until after the expiration of about nineteen months of the act complained of. In appeal to this Court it has been argued that Art. 2 does not apply to any case where the act alleged is a wilful act and that the article only applies where the defendant in doing or omitting to do the act bona fide believed that he was acting correctly and in accordance with law; and it is accordingly contended that the Court below ought to have determined whether or not the defendant wilfully refused to receive the decretal money from the plaintiff and if it found that he did, it ought to have given a decree against him notwithstanding the suit had been instituted after the expiration of ninety days. In support of this contention a number of authorities have been cited. For the most part they are cases in which the defendant claimed the protection of provisions in various enactments requiring notice of action.

In one case no doubt the question whether or not Art. 2, Lim. Act, applied did arise, namely, in the case of *Ranchordas Moorarji v. Municipal Commissioners for the City of Bombay* (1), but it seems to us that the learned Judges who decided that case held that the article of the Limitation Act did not apply, by applying the reasoning which formed the basis of the decision in some cases that the defendant could not plead the want of notice of action. It seems to us that the reasons which have been given in several cases for holding that the defendant could not plead want of notice of action do not necessarily apply to a plea of limitation.

(1) [1901] 25 Bom. 387.

In the present case the whole foundation of the plaintiff's claim is the alleged omission by the defendant to perform a duty imposed by the Code. The policy of the law is quite clear, namely, that suits of this nature should be brought and investigated as promptly as possible. The issue of fact in the present case would have been whether the plaintiff tendered and the defendant refused to receive the decretal amount. A moment's reflection will show how unsatisfactory it would be that such a matter should be investigated two or three years after the sale. It may not be unreasonable, where a defendant pleads as a defence to an alleged illegal act that the act was done in pursuance of a legislative enactment which requires notice of action before the institution of suit that the defendant should show that he acted bona fide and in the belief that his action was justified. But such reasoning is not equally applicable to a plea of limitation. We think that the view taken by the learned District Judge was correct and we accordingly dismiss the appeal with costs.

V.B./R.K.

*Appeal dismissed.***A. I. R. 1918 Allahabad 65**

PIGGOTT AND WALSH, JJ.

Dulli—Accused.

v.

Emperor—Opposite Party.

Criminal Appeal No. 636 of 1918, Decided on 23rd October 1918, from order of Sess. Judge, Ghazipur.

(a) Penal Code (1860), S. 302 — Several persons attacking by lathis and causing death—All are guilty of murder.

Where several persons attack another with lathis and cause his death, they are all guilty of the offence of murder. [P 66 C 1]

(b) Criminal P. C. (1898), Ss. 423 and 439 — High Court cannot in revision convict person whose trial ended in complete acquittal — Appeal however opens out entire case and empowers High Court to record conviction.

Where a trial has ended in the complete acquittal of the accused person, it is not open to the High Court in the exercise of its revisional jurisdiction to convict him of any offence. The utmost that it can do, in the absence of an appeal against the acquittal by the properly constituted authorities, is to order a new trial. [P 65 C 1, 2]

An appeal against a conviction however opens out the entire case, and the appellate Court, being empowered to alter the finding by S. 423 (1) (b), may record a conviction in respect of an offence of which the trial Court has found the accused not guilty. [P 66 C 2]

1918 A/9 & 10

Lalit Mohan Banerji—for the Crown.

Judgment.—In this case Dulli Kurmi was tried upon a number of charges, one of which was a charge of robbery, incorrectly framed under S. 397, I. P. C., which section, as this Court has repeatedly remarked, does not in itself constitute any offence but merely conveys a direction to the Court in the matter of sentence in respect of certain aggravated forms of robbery or dacoity, while there was also a charge of murder under S. 302, I. P. C. The facts deposed to by the prosecution witnesses are as follows: The complainant Sehdu was sleeping in his field to watch over the crop which was ripe or ripening. Shortly before dawn, three men entered the field and proceeded to plunder it of its crop. Sehdu came upon them after they had cut a certain amount of the crop and had made it into bundles for convenience of removal. The thieves set upon him and he shouted for help. He himself received severe injuries from the lathis of the thieves and his neighbour Charittar, who pluckily came to his rescue, was felled to the ground and received such injuries that he died on the spot. The medical evidence shows that Charittar's head had been terribly shattered by a number of blows, which the evidence proves must have been inflicted by the lathis of the thieves. Sehdu's evidence is corroborated by Muhammad Ali and Gopi; each of these men names the thieves who committed this offence and positively identifies the accused Dulli as having been one of them. There was practically no defence, beyond a bare denial and a plea of alibi wholly unsupported by evidence. Moreover Dulli was nowhere to be found when the police inquiry into this matter was taken up, and he has offered no reasonable or credible explanation of his absence from his home and from the neighbourhood for several months following the affray in which Charittar lost his life.

He has appealed against his conviction by the Sessions Court, but his participation in the offence or offences committed under the circumstances above stated is established by overwhelming evidence. The learned Sessions Judge upon this evidence, which he accepted as true, came to the conclusion that the thieves could not be convicted of robbery, because the hurts caused to Sehdu and Charittar had

not been inflicted in carrying away or in attempting to carry away the crop which had been cut from Sehdu's field. He may be justified in his opinion that when they inflicted these injuries, the thieves were merely resisting their own arrest and had abandoned any intention of removing the stolen property, and in that case no conviction of robbery can be recorded. Further, the learned Sessions Judge, by a somewhat involved process of reasoning into which it does not seem necessary for us to enter in detail, arrived at the conclusion that the men who inflicted these injuries upon Charittar neither intended to cause his death nor knew that they were likely to do so. He has accordingly acquitted Dulli of the charge under S. 302, I. P. C., and has convicted him of offences punishable under Ss. 325 and 382 of the same Code. The sentences which he has passed are substantial; but nevertheless the learned Judge of this Court before whom his petition of appeal came up for consideration was of opinion that the order of acquittal on the charge of murder required to be considered by this Court in the exercise of its revisional jurisdiction. Notice has gone to Dulli to show cause and the whole matter is now before us.

On the facts of the case we are unhesitatingly of opinion that Dulli was guilty of the murder of Charittar and liable to punishment under S. 302, I. P. C. The nature of the injuries observed at the post mortem examination puts it beyond doubt that the men who inflicted those injuries intended at the time to cause death, or such injury as they must have known to be likely to result in death. The mere fact that it was impossible for the witnesses to say which of the three robbers inflicted any particular injury on the person of the deceased is, under the circumstances of this case, wholly irrelevant. They were all three of them striking him with lathis and between them they caused his death in the manner already stated. They are all of them equally guilty of the offence of murder.

We have had to consider one further question, namely, the limitation imposed upon the revisional jurisdiction of this Court by Cl. 4, S. 439, Criminal P. C. There is some difference of legal opinion on this point. There is no doubt whatever that, when a trial has ended in the complete acquittal of the accused person, it is not

open to this Court in the exercise of its revisional jurisdiction to convict him of any offence. The utmost that this Court can do, in the absence of an appeal against the acquittal by the properly constituted authorities, is to order a new trial. It is however open to argument whether this clause is intended to apply to cases in which an accused, who has been tried upon more than one charge under the provisions of S. 235 or 236, Criminal P. C., has been acquitted upon one charge but convicted upon another. In the present case this question does not arise for determination. We have before us an appeal by Dulli against his conviction, as well as the notice of enhancement issued by this Court. It is therefore open to us to exercise any of the powers conferred by S. 423 (1) (b), Criminal P. C., as well as any of the powers specified under S. 439 of the same Code. It has repeatedly been held by various High Courts that an appeal against the conviction opens out the entire case, and that the appellate Court, being empowered to alter the finding by S. 423 (1) (b) above referred to, may record a conviction in respect of an offence of which the trial Court has found the accused not guilty.

It is quite true that under this section, considered by itself, the finding can only be altered without enhancement of the sentence; but the power to enhance the sentence is separately conferred upon this Court by S. 439, Criminal P. C. It follows that in the case now before us there can be no question that we have authority to record a conviction under S. 302, I. P. C., and to pass an appropriate sentence. Accordingly we dismiss the appeal of Dulli. We alter the conviction of the said appellant from one under S. 325, I. P. C., to one under S. 302 of the same Code and we enhance the sentence by passing upon Dulli the minimum sentence which the law authorizes us to pass in respect of the offence of which we have found him guilty that is to say, we sentence him to undergo transportation for life. This sentence will run concurrently with the sentence passed by the learned Sessions Judge on the conviction under S. 382, I. P. C.

V.B./R.K.

Sentence enhanced.

A. I. R. 1918 Allahabad 67 (1)

TUDBALL, J.

Gajadhar—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 604 of 1918, Decided on 7th September 1918, from an order of Dist. Magistrate, Fatehpur.

Criminal P. C. (1898). S. 195—Sanction for prosecution—Petty theft committed thirty-eight years previously, denial of—Sanction should not be granted.

Sanction was granted for the prosecution of the accused for perjury in respect of a statement made by him in which he had denied the fact of his having been convicted of petty theft thirty-eight years previously at the age of fourteen:

Held: that the fact which the accused had denied was not relevant to the trial before the Magistrate, and that therefore this was not a fit case in which sanction should have been granted.

[P 67, C 2]

E. A. Howard—for Applicant,*Lalit Mohan Banerji* for *R. Malcomson*—for the Crown.

Judgment.—The facts of this case are as follows: Some thirty eight years ago the applicant *Gajadhar* was convicted on a charge of theft under S. 380, I. P. C. and was sentenced to three months' rigorous imprisonment and a fine of Rs. 5. In the current year he made a complaint against the opposite party *Haribua Chamar*. In cross examination he was asked, "whether he had been convicted in *Khari Baba's* theft case and sentenced to three months' rigorous imprisonment. His reply was no."

Haribua Chamar applied to the Magistrate for sanction to prosecute *Gajadhar* for perjury, in that he had falsely stated that he had not been sentenced to three months' rigorous imprisonment in *Khaki Baba's* theft case. That sanction has been granted and it was upheld on appeal by the District Magistrate. *Gajadhar* has come to this Court on revision. It has been shown by the production of a public register that *Gajadhar* was convicted in a theft case some thirty eight years ago and sentenced to three months' rigorous imprisonment and a fine. The record has been destroyed and there is apparently nothing to show who was the complainant in that case, and as the matter stands the register apparently does not prove that *Gajadhar* was sentenced to three months' rigorous imprisonment in *Khaki Baba's* theft case. Even supposing however, that he did falsely deny this conviction, it is obvious that the Magistrate trying the case ought, in simple justice, to have refused to allow such a

question to be put to the witness. The fact that at the age of fourteen the man was convicted of petty theft (while nothing has been shown against him in respect to the intervening years) was quite irrelevant to the trial before the Magistrate. Such a conviction would not be considered by any Court even if *Gajadhar* had been upon his trial for a subsequent offence. Nor is it fair or just to throw into a man's teeth a petty theft committed by him when he was but a boy. It is difficult to understand how any Magistrate could grant sanction to a private person to prosecute another in circumstances like this, and it is impossible for me to understand the frame of mind of the District Magistrate when he upheld such an order on appeal. It would be obviously persecution, not prosecution, to allow any such trial to go on. I allow the application. I set aside the order of the Court below.

v.B./R.K. *Application allowed.***A. I. R. 1918 Allahabad 67 (2)**

TUDBALL, J.

Thakurdas—Applicant.

v.

Abdulla—Opposite Party.

Criminal Revn. No. 710 of 1918, Decided on 1st November 1918, from an order of Offg. Sessions Judge, Benares.

Criminal P. C. (1893), Ss. 195 and 476—Perjury committed in summary trial—Court must take action itself.

Where during the course of a summary trial the Court is of opinion that perjury has been committed, it should take action itself instead of placing in the hands of a private person the right of vindicating the law. [P 67 C 2]

G. Banerji—for Applicant.*Muhammad Yusuf*—for Opposite Party.

Judgment.—The circumstances of this case are such that no private sanction, in my opinion, ought to have been granted. The trial of the original case was a summary trial. There is no record of the evidence. The matter is one involving the eternal Hindu and Mussulman question. In the absence of any record of the evidence, it would be difficult indeed to secure a conviction. There are many ways of explaining the fact that the applicant made a statement which was incorrect. In such a matter as this if the Court thought that perjury had been committed, it would have been better advised if it had taken action itself instead of placing in the hands of a private person the right of vindicating the law. I allow

the application and set aside the order of the Court below. The application for sanction is refused.

V.B./R.K.

Application allowed.

A. I. R. 1918 Allahabad 68

TUDBALL, J.

Ram Prasad--Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 557 of 1918, Decided on 23rd September 1918, from an order of Cantonment Magistrate, Meerut.

Criminal P. C. (1898), Ss. 439, 476 and 195 — Sanction for prosecution for perjury granted by civil Court — High Court has no power to set it aside either under S. 439 or under Civil Procedure Code (1908), S. 115.

The High Court has no power under S. 439, Criminal P. C., to set aside an order made by a Court of Small Causes directing the prosecution of a decree-holder for perjury in respect of a statement made by him before that Court, nor can such an order be interfered with under S. 115, Civil P. C. [P 68 C 2]

Satya Chandra Mukerji—for Applnt.

Lalit Mohan Banerji and *R. Malcomson*—for the Crown.

Judgment—The facts out of which this revision on the criminal side has arisen are as follows: Pending in the Court of the Cantonment Magistrate of Meerut in his capacity as a Small Cause Court was an execution case. The decree-holder was directed to deposit the diet money of his judgment-debtor who was about to be arrested. He was ordered to do so within three days and the order was passed on 9th July 1918. The 10th, 11th and 12th July were holidays, so that the only two days on which he could possibly deposit the money were the 9th and the 13th of the month. On the 15th of the month he made a complaint to the Cantonment Magistrate that although he had tendered the money to the Civil Ahlmad Mul Chand, the latter had refused to take it and had made it impossible for him, the decree-holder, to comply with the order. On 15th July the Cantonment Magistrate made the following report to the Collector for orders:

"The Civil Ahlmad Mul Chand admits that the decree-holder tendered the fees but that he, Mul Chand, did not accept them at the instigation of the Chaprasi Sharfu who, it appears, is related to the defendant."

Assuming that this report is correct, and there is absolutely no reason to doubt it, on 15th July the Civil Ahlmad Mul Chand did admit to the Cantonment

Magistrate that the money had been offered to him and that he had refused to take it. I gather that it was the Cantonment Magistrate's object in making this report to get the Ahlmad punished. On 30th July the Collector wrote an order which goes to show that Mul Chand at his departmental enquiry had not admitted that the money had been tendered to him. Though this is not really stated in the order, it is a natural inference from the language of that order, for the Collector came to the conclusion that the charge made against Mul Chand was untrue and he sent the papers back to the Cantonment Magistrate with the following remarks:

"If you agree with me, I think that you should recommend the prosecution of the decree-holder under S. 182, I. P. C., as reckless complaints of this kind are far too common, and I think that it is our duty to protect our subordinate officials from them."

On receipt of this the Cantonment Magistrate passed his order of 31st July 1918, which the applicant Ram Prasad now seeks to have revised in this Court. In that order the Cantonment Magistrate remarked as follows:

"In consequence I reported Mul Chand to the Collector, who has enquired into the case and finds that the complaint is a false one. I concur in the Collector's finding and I therefore sanction the prosecution of Ram Prasad under S. 182, I. P. C., under the provisions of S. 195, Criminal P. C."

These are the facts as they stand before me. I have not the slightest hesitation in saying that if sitting as a criminal Court I had power to revise this order, I should at once set it aside in view of the Cantonment Magistrate's order of 15th July 1918, mentioned above, but it seems to me, that I have no authority or jurisdiction whatsoever sitting on the criminal side to interfere with this order. It amounts to a complaint made by a civil Court against a certain person for having given to that Court false information in regard to a certain matter. The order cannot be brought to this Court on the criminal side. At the utmost it could be brought up before this Court on the civil side and even in that aspect also it would be impossible to interfere under S. 115, Civil P. C. The order I am afraid will stand, not because I would not set it aside, but because I am unable to do so. The application is rejected.

V.B./R.K.

Application dismissed.

* * A. I. R. 1918 Allahabad 69

Full Bench

KNOX, BANERJI, TUDBALL, RAFIQUE
AND WALSH, JJ.*Chunni Lal*—Defendant—Appellant.

v.

Narsingh Das—Plaintiff—Respondent.

Second Appeal No. 1473 of 1915, Decided on 15th December 1917, from the decree of Dist. Judge, Mainpuri.

* * (a) Tort—Defamation—Privilege—Words in complaint to criminal Court are absolutely privileged.

So far as a civil suit for damages is concerned, defamatory words used by a party in a complaint to a criminal Court are absolutely privileged and are not actionable. [P 71 C 1]

(b) Tort—Defamation—No Statute in India dealing with civil liability for defamation—Rules to be applied are rules of justice, equity and good conscience if found applicable to Indian society.

There is no Statute in India dealing with civil liability for defamation. The rules to be applied, therefore are the rules of equity, justice and good conscience which has been interpreted by the Privy Council to mean the rules of English Law if found applicable to Indian society and circumstances; and as there is nothing in the circumstances and society of this country that would make it improper or inadvisable to apply the English rule, what is sound public policy in England is equally sound policy in India and the rule of English law is in accordance with the principles of justice, equity and good conscience. [P 70 C 1,2]

(c) Interpretation of Statutes—Application by Courts—Plea that criminal enactment can be interpreted as amending civil law by implication cannot be supported.

There is no support for the plea that a criminal enactment can be interpreted as amending the civil law by implication though it may be anomalous that a party should be criminally punishable and yet be not civilly liable. [P 71 C 1]

(d) Interpretation of Statutes—Application by Courts—Civil and Criminal law and procedure are independent of each of other.

The civil and criminal law and procedure do not coincide but are independent of each other. [P 70 C 1]

* (e) Tort—Defamation—Plea of truth is complete defence in civil action—It is not so in criminal trial.

In a civil action for libel the plea of mere truth is if established a complete defence. In a criminal charge it is not so for the accused has further to prove the fact that it was for the public good that the imputation was made or published. [P 70 C 1]

Peary Lal Banerji—for Appellant.

Sundar Lal—for Respondent.

Judgment.—This second appeal arises out of a civil action for damages for defamation, the facts of which are briefly as follows: The defendant who is the appellant before us was prosecuted in a

criminal Court- for an offence under S. 193, I. P. C.. The plaintiff, who is a pleader appeared to defend him. The Court allowed bail and the plaintiff stood surety for the defendant to the extent of Rs. 100. Not being sure of his client, however he asked the Court to allow Rs. 100 to be deposited in cash. The prayer was granted. The defendant produced the cash giving it to the plaintiff and it was actually deposited on the same date, 22nd August 1913, in the Sub-Treasury at Shikohabad. There was some error in the usual procedure for the depositing of money and the full number of acknowledgments was not issued.

On 4th September 1913 the case was heard and the defendant acquitted. On that date however he employed another pleader; on 17th September 1913 he filed a petition stating that no receipt had been issued by the Treasury and he was in doubt as to whether the money had actually been deposited by the plaintiff. He asked for inquiry to be made from the Tahsildar. Inquiry was ordered and made on 22nd September 1913; the Court received a reply that the money had actually been deposited on August 22nd. Without first inquiring from the Court the result of the inquiry ordered, the defendant, on 24th September 1913, filed a written complaint in the Court of the District Magistrate charging the plaintiff with having committed the offences of cheating and criminal breach of trust in respect to the sum of Rs. 100.

The District Magistrate issued no process on this complaint, but made a preliminary inquiry and dismissed it on ascertaining the fact as to the deposit. The plaintiff thereupon prosecuted the defendant in a criminal Court. For reasons with which we are not concerned, the defendant was acquitted. The plaintiff then filed the suit out of which this appeal has arisen to recover Rs. 1 000 as damages for defamation. The Courts below have decreed the claim to the extent of Rs. 200. Hence the present appeal by the defendant. The plea raised on his behalf is that in a civil action arising out of facts such as have been found in the present case, the defendant has an absolute privilege and is absolutely protected by the law from a civil action for damages for defamation. For the plaintiff it is urged that in such a case there is no absolute privilege but only a

qualified privilege and that as the defendant did not act in good faith he is not protected. There being a conflict of rulings on the point, the case has been referred to this Full Bench for decision.

We deem it necessary in view of certain arguments that have been raised before us in regard to the criminal law of defamation, to emphasize in the forefront of our judgment that we are "not" here concerned with libel as a criminal offence, but only with the civil wrong and the right to redress in a civil action. The civil and the criminal law and procedure do not in our opinion, coincide but are independent of each other. We may quote as an instance one admitted difference between the civil and the criminal law. In a civil action the plea of mere truth is if established, a complete defence. In a criminal charge it is not so for the accused has further to prove the fact that it was for the public good that the imputation was made or published. We therefore restrict ourselves to the civil wrong and the right to redress in a civil action. Next it is clear (and is also admitted before us) that the English rule of law on the point for decision is well established and beyond discussion and that under that rule the appellant before us would be absolutely protected. It is unnecessary therefore to discuss the English decisions on a principle which has been accepted for generations and has never been questioned in England. It has been recognized by Indian Judges. It has to be conceded before us that the High Courts of Bombay and Madras have applied it without hesitation and that the latter has even gone to the extent of applying it to criminal cases on the correctness of which we abstain from expressing any opinion.

There is no Statute in India dealing with civil liability for defamation. We have therefore to apply the rules of equity, justice and good conscience. This has been interpreted by the Privy Council in *Waghela Rajsanji v. Shekh Masludin* (1) to mean the rules of English law if found applicable to Indian society and circumstances. On behalf of the plaintiff-respondent it is urged that in the present instance the rule of English law is inapplicable to the circumstances of this country and that whatever may have been the rule applied prior to 1860, the legis-

lature in introducing the Penal Code in that year did not apply the rule of English law to criminal cases and may be said, by implication, to have amended the civil law. Reliance has been placed on the decision of the Calcutta High Court in *Augada Ram Shaha v. Nemai Chand Shaha* (2) and on the dictum in *Abdul Hakim v. Tej Chander Mukarji* (3).

Reference has also been made to several decisions in criminal cases, but we decline to discuss them for the reasons already given. In regard to the first part of the argument the learned advocate for the respondent has failed to show us what there is in the circumstances and society of this country that would make it improper or inadvisable to apply the English rule. It is suggested that the mass of the population is uneducated and more impulsive and sensitive and therefore more likely to take the law into its own hands if it cannot get redress for defamation and that therefore it would not be sound public policy to enforce the English rule. We do not think that these are weighty reasons. The English law does not seek to protect dishonest parties, witnesses or advocates; but deems it a lesser evil that they should escape than that the great majority of honest parties, witnesses and advocates should be exposed to vexatious actions. Unless it can be said that the great majority of these classes in India is dishonest, there can be no good reason against applying the same rule in this country. Needless to say this has not been urged before us and in this instance we consider that what is sound public policy in England is equally sound policy in India and that the rule of English law is in accordance with the principles of justice, equity and good conscience. The dictum of the Privy Council in the case of *Baboo Gunesh Dutt Singh v. Mangneeram Chowdhry* (4) support us; that in *Abdul Hakim v. Tej Chandar Mukarji* (3) is based on vague and indefinite grounds.

We cannot agree with the decision of the Calcutta High Court in *Augada Ram Shaha v. Nemai Chand Shaha* (2). It appears to be based upon the assumption that there was no law of defamation in India before the Penal Code. This is not

2. (1896) 23 Cal 867.

3. (1881) 3 All 815.

4. (1873) 11 Bom L R 321=17 W R 283 (P O).

1. (1887) 11 Bom 551=14 I A 89.

the case, for there are reported decisions on the subject in this province as far back as 1852. Moreover the learned Judges applied the test of the criminal law to the civil law, whereas we hold that the two are independent of each other. Lastly the plea that a criminal enactment can be interpreted as amending the civil law by implication stands unsupported. It may be anomalous that a party should be criminally punishable and yet be not civilly liable in a case like the present, but it is not the only anomaly in this branch of the law. We therefore hold that defamatory words used on such an occasion as is alleged by the plaintiff in this suit are not actionable on the ground of absolute privilege and that the present suit fails. We allow this appeal, set aside the decrees of the Courts below and dismiss the suit. In view of the circumstances of the case the parties will abide their own costs throughout.

V.B./R.K. *Appeal allowed.*

A. I. R. 1918 Allahabad 71

BANERJI AND PIGGOTT, JJ.

Nasiruddin Husain — Plaintiff—Applicant.

v-

Ashfaq Husain—Defendant—Opposite Party.

Civil Revn. No. 211 of 1917, Decided on 26th June 1918, from an order of Sub-Judge, Meerut. D/-17th August 1917.

Civil P. C. (1908). O 32, R 2—Plaint filed by minor without next friend—Election to proceed after attaining majority — Presentation of plaint held proper.

A plaint was filed on 3rd March by a minor without a next friend. On 15th March when the plaint was put up before the Court, the plaintiff who had in the meantime attained majority filed an application to be allowed to proceed with the plaint. The plaint was registered and notice was issued to the other side. On the application of the other side the Court ordered the plaint to be taken off the file on the ground that the suit was instituted by a minor without a next friend:

Held: that there was an irregular presentation of the plaint on 3rd March but that as on 15th March the plaintiff, who had by that date attained majority, elected to proceed with the plaint, there was a proper presentation of the plaint on that date. [P 71 C 2]

Nihal Chand, Baldeo Ram Dave and Iqbal Ahmed—for Applicant.

S. M. Sulaiman and Surendra Nath—for Opposite Party.

Judgment.—The facts of the case out of which this application arises are these. On 3rd March 1917 a plaint was filed

in the Court of the Subordinate Judge of Meerut. The office reported that the plaintiff would attain majority on 5th March 1917 and that the suit had been instituted by a minor without a next friend. The Court ordered the plaint to be brought forward in the presence of the pleader for the plaintiff and fixed a date for that purpose. On 15th March 1917 an application was filed signed both by the pleader for the plaintiff and the plaintiff himself in which the plaintiff stated that he was not a minor on the date of the filing of the plaint, that in any case he had completed his age of twenty one years and that he wished to proceed with the plaint. Thereupon the Court ordered the plaint to be registered and issued notice of the suit to the other side. An application was made on behalf of the defendants to have the plaint taken off the file on the ground that the suit had been instituted by a minor without a next friend. This application was granted and the Court ordered the plaint to be taken off the file. Against this order the present application for revision has been brought. In our opinion there was an irregular presentation of the plaint on 3rd March 1917 and that the plaint was lying in the Court without its being registered from that date to 15th March. On 15th March the plaintiff elected to proceed with the plaint, and we must take it that there was a proper presentation of the plaint on that date. It was upon that application that the Court ordered it to be registered. This being so, we must hold that the plaint was properly presented on 15th March when the plaintiff was of full age, and therefore there was no justification for the order directing the plaint to be taken off the file. The Court in making that order refused to exercise the jurisdiction which was vested in it. We allow the application, set aside the order of the Court below and direct it to take back the plaint as instituted on 15th March 1917 and proceed to hear the suit according to law. Under the circumstances we direct that the parties do abide their own costs of the application.

V.B./R.K. *Application allowed.*

A. I. R. 1918 Allahabad 72

PIGGOTT AND RAFIQUE, JJ.

Gokul—Plaintiff—Appellant.

v.

Mohri Bibi—Defendant—Respondent.

Second Appeal No. 51 of 1916, Decided on 18th January 1918, from a decree of Sub-Judge, Mirzapur.

Civil P. C. (1908), O. 21, R. 58—Objection dismissed without investigation—Case is taken out of one year's rule of limitation—Claim under O. 21, R. 58—Other party disputing claim—No evidence produced by claimant—Objection dismissed—Dismissal cannot be said to be without investigation—Limitation Act (1908), Art. 11.

An objection under O. 21, R. 58, if dismissed without investigation takes the case of the objector out of the operation of the one year's rule of limitation prescribed by Art. 11, for the establishment of his right by a suit. [P 73 C 2]

The only order under O. 21, R. 58, upon which the character of finality is impressed, is an order made upon inquiry. It does not follow however that merely because the claimant does not advance evidence or is absent, there are no materials before the Court to enable it to inquire into the matter. [P 74 C 1]

Plaintiff made an objection under O. 21, R. 58, the correctness of which was disputed by the opposite party, and no evidence having been produced to make out the truth of the claim, the Court dismissed the objection and the plaintiff brought a suit to establish his right more than a year after the date of the order:

Held: that though the plaintiff produced no evidence in support of his objection, it did not follow that there was no material on the record to enable the Judge to dispose of the objections, which could not therefore be said to have been decided without investigation and that as the plaintiff failed to bring a suit to establish his right within one year from the date of the order, his claim was barred under Art. 11. [P 74 C 1]

S. A. Haidar—for Appellant.

Surendra Nath Sen—for Respondent.

Judgment.—The facts which have given rise to this appeal are as follows: There were three brothers, Kauleshar, Chandu and Jageshar, who owned a fixed rate holding of seven bighas and five biswas. According to the plaint the three brothers separated and the holding was privately divided amongst them. On 9th January 1900, the name of Jageshar was entered in respect of two bighas and five biswas and the rest, five bighas, stood in the name of two brothers, Kauleshar and Chandu. Kauleshar died leaving him surviving his son Gokul. Chandu died leaving him surviving a widow only and no issue. One Basant Lal obtained a simple money decree against Jageshar, one of the brothers mentioned above, and against Govind, a third party. In execution of his decree Basant Lal attached

the whole of the holding, namely, the fixed rate holding of seven bighas and five biswas. At the time of the attachment the two widows of Kauleshar and Chandu were alive, as also the son of Kauleshar, called Gokul, who was a minor at the time. On 27th March 1901, Gokul filed an objection through his mother as guardian, objecting to the attachment, presumably on the ground that his father and uncle, Chandu, were separate from Jageshar and their property was not liable to sale and attachment in the decree of Basant. On 5th June 1901, the date fixed for hearing the objections, an application was presented to the Court on behalf of the guardian of the minor praying for an adjournment, on the ground that the information of the date of hearing had reached the guardian too late to take steps for production of evidence. The learned Subordinate Judge rejected the application for adjournment and proceeded to dispose of the objections. The order he made on the objections is as follows:

"This is an objection under S. 278, Civil P. C. The correctness of it is disputed by the defendants. The objector has produced no evidence to make out the truth of his claim and it is dismissed with costs."

After the rejection of the objection the entire holding of seven bighas and five biswas was put up to auction and purchased by Basant Lal, the decree holder. On 21st June 1902, the Amin, who was deputed to deliver possession to the purchaser, reported that the widows of Kauleshar and Chandu had obstructed him in his duties. The purchaser having taken no steps, his application for delivery of possession was rejected on 5th July 1902. On 19th July 1903, he again applied for delivery of possession and succeeded in getting it on 23rd February 1904. On 20th June 1914, Gokul, the plaintiff-appellant, instituted the suit out of which this appeal has arisen, for possession of five bighas of the fixed rate holding on the allegation that the said land was not liable to attachment and sale in execution of the decree of Basant Lal against Jageshar. Gokul further stated in his plaint that his father Kauleshar and his two uncles Jageshar and Chandu had separated long prior to the decree of Basant and had divided the holding equally amongst themselves. After the separation each brother was in possession of his own share. Basant Lal, the decree holder could only sell the share of Jageshar. At

the time of execution of the decree of Basant Lal he the plaintiff was a minor and was entitled to object as regards the share of the holding that belonged to his father only. Chandu's widow, Mt. Katwari, was alive at the time of the attachment and the sale of the holding. She died some years after. On her death the share of Chandu came to the plaintiff as the reversionary heir. He attained majority in June 1912, hence the suit was brought for recovery of possession of that portion of the holding which belonged to his father and his uncle Chandu. The claim was resisted on various pleas. It was urged on behalf of the defendant that the three brothers were joint and had never separated and that the decree against Jageshar had been passed in the capacity of the karta of the family. It was therefore binding on all the three brothers and their legal representatives. The plea of limitation was urged in respect of the entire claim on the basis of the plaintiff's objections, dated 27th May 1901. The learned Munsif in whose Court the suit was filed, held that the three brothers were joint and therefore the decree of Basant Lal was binding on the plaintiff. He further found that the objections, dated 27th May 1901, made by the plaintiff through his mother related to the whole of five bighas the alleged share of Chandu and Kauleshar, and the objections having been dismissed and the suit having been brought more than one year after the dismissal, the present claim was barred under Art. 11, Sch. 1, Lim. Act. The plaintiff preferred an appeal to the District Judge, who disagreed with the First Court as to the status of the family of the three brothers but agreed with it as to the plea of limitation. The learned District Judge held that the three brothers were separate but that the claim was obviously barred under Art. 11, Sch. 1, Lim. Act.

The plaintiff in his second appeal to this Court advances two contentions. He says that his claim is not barred under Art. 11, Sch. 1, Lim. Act, inasmuch as his objection was dismissed without any investigation and, secondly, in any case his claim with regard to 2 bighas 10 biswas of the holding which he inherited from his uncle, Chandu, after the death of the latter's widow cannot be said to be barred by limitation as the lady died after the dismissal of the objections and

she had taken no objection to the attachment and sale of the holding. The second contention may be dismissed in a few words. There is a distinct finding of the learned Munsif that the objections of the plaintiff related to 5 bighas of the holding, that is, the share of his, i. e., plaintiff's father and uncle. The plaintiff took no objection to this finding in his appeal to the District Judge. There is nothing on the record to make us come to a different conclusion and hold that the objections related only to the share of Kauleshar.

In the plaint itself the plaintiff does not mention the fact of having made an objection in 1901 and there does not seem to be any replication or any statement by him in reply to the written statement that his claim was barred because it was brought a year after the order of 5th June 1901. In support of the first contention a number of cases have been cited by the learned counsel for the plaintiff-appellant. The following cases have been relied upon by the plaintiff, namely, *Kullar Singh v. Toril Mah-ton* (1), *Kunj Behari Lal v. Kandh Prashad Narain Singh* (2), *Sarat Chandra Bisu v. Tarini Prasad Pal Chowdhry* (3), *Sarala Subba Rau v. Kamsala Timmayya* (4) and *Sojan Ram v. Bam Rattan* (5). According to these cases an objection made under S. 278 of the old Civil P. C., corresponding to O. 21, R. 58 of the present Code if dismissed without investigation would take the case of the objector out of the operation of one year's rule of limitation. But the question is, what does the word "investigation" mean? There are cases which go to show that the circumstances under which the objections of the plaintiff were disposed of were not such as to warrant the conclusion that they were decided without investigation: vide *Rahim Bux v. Abdul Kader* (6), *Shagun Chand v. Shitbi* (7) and *Chandi Prasad v. Nand Kishore* (8). We would also refer to *Lachmi Narain v. Martindell* (9), for the principle according to which the limitation of one

(1) [1897] 1 O. W. N. 24.

(2) [1907] 6 C. L. J. 362.

(3) [1907] 34 Cal. 491.

(4) [1908] 31 Mad. 5.

(5) [1904] 87 P. R. 1904.

(6) [1905] 32 Cal. 537.

(7) [1911] 10 I. C. 401.

(8) [1913] 20 I. C. 369.

(9) [1897] 19 All. 253 (F B).

year should be enforced. Most of the case law has been discussed by Mookerji, J., in the case of *Kunj Behari Lal v. Kandh Prashad Narain Singh* (2). After the consideration of the case law the learned Judge concludes thus:

"It is manifest therefore from the language of the Code itself, that the only order upon which the character of finality is impressed is an order made upon inquiry."

He also remarks:

"It does not follow however that merely because the claimant does not advance evidence or is absent there are no materials before the Court to enable it to inquire into the matter."

In the present case the learned Subordinate Judge dismissed the objections of the plaintiff, not in default, nor without any investigation. It is true that the plaintiff produced no evidence in support of his objections but it does not follow that there was no material on the record to enable the Judge to dispose of the objections. We think that the cases relied upon by the plaintiff appellant are distinguishable from the case before us. The appeal therefore fails and is dismissed with costs.

V.B./R.K.

Appeal dismissed.

A. I. R. 1918 Allahabad 74

PIGGOTT AND WALSH, JJ.

Lachmi Kunwar — Defendant — Appellant.

v.

Durgai Kunwar — Plaintiff — Respondent.

First Appeal No. 79 of 1916, Decided on 8th May 1918, from decree of First Addl. Sub-Judge, Aligarh.

Contract Act (9 of 1872), S. 21—Agreement by widows of Hindu joint family to share estate equally based on wrong view of law—Agreement is liable to be set aside on ground of common mistake.

N and *P* two brothers, constituted a joint Hindu family. *N* died leaving a widow *L* and subsequently *P* died leaving a widow *D*. *L* and *D* executed an agreement which recited that *N* and *P* were joint, that *N* had died first and *P* afterwards and that *L* and *D* were entitled to their estate in equal shares. The document then proceeded to apportion the estate between *L* and *D*. Disputes having arisen between the widows over the collection of certain debts owing to their husbands, *D* sued for a declaration that she had been deceived into executing the agreement and that it was not binding upon her:

Held: that the agreement being based on the recital that the widows were entitled to the estate of their husbands in equal shares which was wrong in fact, if *D* was induced to believe it to be true by anybody better acquainted with the facts, she was entitled to relief against the agreement on the ground that she was deceived

into executing it and that she executed it without such knowledge of the facts and of her true position as would be necessary to bind a pardashin woman in a transaction of this sort and that if, on the other hand both parties were under the mistaken impression as to their ownership, the agreement was liable to be set aside, on the ground of common mistake. [P 76 C 1]

B. E. O'Connor and *S. Adullah*—for Appellant.

Peary Lal Banerji—for Respondent.

Judgment.—The litigation leading to these two first appeals arises out of the following state of facts. One Kundan Lal had two sons, Nathmal Das and Pem Raj. Nathmal Das died in the month of June 1913, leaving no children surviving him but a widow Mt. Lachmi Kunwar, who is the appellant in both the appeals now before us. Pem Raj died in the month of February 1914. He left no son but he left daughters and a widow Mt. Durga Kunwar, who is the respondent in both these appeals. It is a matter of some significance that there are now living sons of the aforesaid daughters of Pem Raj by the respondent Durga Kunwar. On 29th July 1914 the two widows presented themselves outside the office of the Sub-Registrar at Khurja. Mt. Lachmi Kunwar there tendered for registration a certain document which is printed at A 20 and the following pages of our record of first Appeal No. 80 of 1916. The Sub-Registrar read over this document to the two ladies who were sitting concealed from the public gaze behind the curtains of a bullock cart. Each lady was identified by an own brother there present for that purpose. The Sub-Registrar read over the document and both ladies admitted execution. The document was then registered. It commences with a recital to the effect that the two brothers, Nathmal Das and Pem Raj, lived jointly, which is followed up by the emphatic amplification that "they were joint in food, business and everything." It is then admitted that Nathmal Das died first and Pem Raj after him, but upon this admission follows the curious recital that the two executants of the document, the widows of the aforesaid brothers, "became the owners of the property left by our husbands in equal shares."

On this basis the two executants proceeded to a detailed division and apportionment of the estate which originally belonged to Nathmal Das and Pem Raj bet-

ween themselves. It is not denied that the apportionment is a fair one on the basis on which it proceeded, namely, on the assumption that the two executants were the owners of the property in equal shares. About a year later a dispute broke out upon applications made by both ladies for a succession certificate in respect of the collection of certain debts due to their husbands. The necessary certificate was eventually granted to Mt. Durga Kunwar for reasons with which we are not concerned; but the dispute over this matter led to the institution of two distinct suits. In each case one of the widows came into Court as plaintiff and impleaded the other as defendant. Mt. Lachhmi Kunwar asked for a declaration affirming her right to separate possession and enjoyment of the property allotted to her by the deed of 29th July 1914, already referred to. In her plaint she states that on the death of each of the brothers, their respective widows had entered into possession and enjoyment each undivided share in the family property belonging to her own husband. She then suggests that a dispute had arisen because she, Mt. Lachhmi Kunwar, had been authorised by her late husband to adopt a son to him and was proposing to exercise that right. Hence there was a reference to arbitration and a division of the property between the two ladies was effected by two arbitrators named in the plaint. The deed of 29th July 1914 was drawn up on the basis of the division made by these arbitrators. It was duly executed by both the parties and Mt. Lachhmi Kunwar claims that it is binding upon the widow of Pem Raj. Mt. Durga Kunwar sues for a declaration that she is in no way bound by this document, that she is in law the owner of the entire property which had formerly belonged to the two brothers, Nathmal Das and Pem Raj, and is entitled to be put and maintained in possession of the same in spite of anything contained in the partition deed already mentioned. Her case against that document is set forth in paras. 9 and 10 of her plaint, the essential portion of which it seems worthwhile to reproduce in detail:

"The plaintiff has not executed any deed of partition, nor did the plaintiff understand her legal rights, nor was there any opportunity to understand them. If the defendant took unlawful advantage of the plaintiff's position impro-

perly on the strength of her brothers and obtained any document from the plaintiff on false allegations, such proceedings cannot be binding upon the plaintiff, nor can the defendant benefit from such proceedings and documents. The plaintiff is a pardanashin lady and is illiterate and hard of hearing. She has no knowledge of zemindari affairs and legal rights. Moreover she did not get an opportunity to make enquiries owing to grief."

In the evidence which she gave in Court Mt. Durga Kunwar went the whole length of setting up a case of fraud, pure and simple. She said that the brothers of Mt. Lachhmi Kunwar, having secured the assistance of her own brother, took her to the Tahsil at Khurja, telling her that certain arrangements were being made about the lambardarship of the landed property. She was too hard of hearing to be able to understand any document from its merely being read over to her, but she had been told that she must say "yes" in reply to any question that might be asked her and must put her thumb impression to any paper which might be placed before her for that purpose. In this way she accounts for the execution of the deed in question. There has been a good deal of conflicting evidence in the Court below, but the learned Subordinate Judge has made up his mind to go the whole way with Mt. Durga Kunwar and has substantially found in favour of her allegations of fraud as made in her evidence. In appeal, we have been asked to consider rather what would be the position of Mt. Durga Kunwar in respect of this document, even assuming that she executed it after understanding its contents and its general effect as dividing the family property equally between herself and Lachhmi Kunwar. The first question which comes up for consideration in this connection, is that of the jointness or separation of Nathmal Das and Pem Raj. There was a distinct issue upon this point in the Court below and a good deal of conflicting evidence was produced; but the learned Subordinate Judge has come to a clear finding that the brothers were members of a joint undivided Hindu family at the moment of the death of Nathmal Das. This finding is not challenged in the memorandum of appeal which Mt. Lachhmi Kunwar has filed in identical terms in each of the two cases. It is unnecessary therefore for us to go into the evidence upon which it rests, beyond remarking that there certainly was evidence

to support it, including Mt. Lachhmi Kunwar's own admission in the disputed document of 29th July 1914. We must take it therefore that when Nathmal Das died, the whole of what had been the joint family property of himself and his brother, passed by survivorship to Pem Raj. Mt. Lachhmi Kunwar retained nothing in law except a right to maintenance. When Pem Raj died, the estate vested by inheritance in his widow Mt. Durga Kunwar. The question then is whether this lady is bound by a gratuitous alienation of one-half of this property, effected on the basis of a document which starts with the recital that she and Mt. Lachhmi Kunwar are the owners of the property in question in equal shares. This recital is wrong upon the facts. If Mt. Durga Kunwar was induced to believe it to be true by any body better acquainted with the facts, she is entitled to relief against this document on the ground that she was deceived into executing it and that she executed it without such knowledge of the facts and of her true position as would be necessary in order to bind a pardanshin lady in a transaction of this sort. If, on the other hand, both the parties to the document were under a mistaken impression as to their ownership, the contract in question is liable to be set aside on the ground of common mistake, if upon no other. From this point of view the position seems clear enough. The best that could be said on behalf of Mt. Lachhmi Kunwar has been to contend that the document in question represents in some way a reasonable settlement of a bona fide dispute. That dispute can scarcely have been on the question whether Nathmal Das and Pem Raj were joint or separate, when the document itself recites that they were joint. In Mt. Lachhmi Kunwar's plaint, and also in some of the evidence led by her, an attempt was made to suggest that there was a bona fide dispute between the parties of quite a different kind. The suggestion is that Mt. Lachhmi Kunwar was proposing to adopt a son to her deceased husband, that the effect of this adoption would be to deprive Mt. Durga Kunwar of the estate held by her as widow of Pem Raj, or at least of one half of the estate, and that, in order to avoid a dispute upon this point and to make sure that any adoption which Lachhmi Kunwar might effect, would not give the adoptive son more

than one-half of the estate, she was induced to enter into the transaction in question. Whether the evidence on the record would bear out this plea, as a matter of fact, assuming that it proceeded upon correct propositions of law, is an arguable question. The plea may be disposed of upon the ground that it does not proceed upon a correct proposition of law. It is sufficient to refer to two cases, *Chandra v. Gojarabai* (1) and *Adivi Suryaprakasa Row v. Nidamarty Gangaraju* (2), as authority for the proposition that any adoption which Mt. Lachhmi Kunwar might make, or might purport to make, to her deceased husband, after that husband and his surviving brother were both dead, could not affect the right of Mt. Durga Kunwar who had inherited the estate as widow of Pem Raj. Nor could such adoption affect the rights of the reversioners; that is to say, the estate would pass on the death of Durga Kunwar to the reversionary heirs of Pem Raj, and these according to the evidence on the record, would probably be, first, his daughter or daughters, and eventually the sons of the said daughters. One of the points against the appellant in these cases is that, from any point of view, the alienation purporting to be effected by Mt. Durga Kunwar of one-half of the estate under the agreement in dispute, could not possibly stand against a suit by the reversionary heirs of Pem Raj. In the view which we take of the case and of the law applicable to the established facts, it is not necessary for us to go the whole length of the finding upon which the Court below has disposed of the two suits. We think that the decision of the Court below is correct; that Mt. Durga Kunwar is not bound by this agreement and is entitled to succeed in her claim to the possession of the entire property. Both these appeals therefore fail and we dismiss them with costs.

V.B./R.K.

Appeal dismissed.

1. (1890) 14 Bom 463.

2. (1910) 33 Mad 228=4 I C 386.

A. I. R. 1918 Allahabad 76RICHARDS, C. J. AND BANERJI, J. .
Nizamuddin Shah—Appellant.

v.

Bohra Bhim Sen—Respondent.

First Appeal No. 321 of 1916, Decided on 5th January 1918, from decree of Sub-Judge, Agra, D/- 21st July 1916.

(a) Limitation Act (9 of 1908), Art. 181—Mortgage preliminary decree appealed against—Appellate decree is to be made final—Time is to be counted from that decree.

Where an appeal is preferred from a preliminary decree in a mortgage suit the decree of the High Court is the decree in respect of which an application for a final decree is to be made. The rule of limitation applicable to an application for a final decree is that provided by Art. 181 and time begins to run from the period for payment fixed by the decree of the High Court.

[P 77 C 2]

(b) Limitation Act (9 of 1908), S. 6—S. 6 does not apply to application to make mortgage decree final.

Section 6 does not apply to an application for a final decree in a mortgage suit, inasmuch as it is not an application for execution of a decree.

[P 77 C 2]

(c) Civil P. C. (5 of 1908), O. 22, R. 3—Mortgage suit remains suit till final decree is passed—Suit abates on death of defendant after such decree without legal representative being brought on record.

A mortgage suit remains a pending suit even after the preliminary decree is made, so that if after the making of the preliminary decree the defendant dies and his legal representatives are not brought on the record of within the period of limitation, the suit will abate.

[P 77 C 2]

B. E. O'Connor and *S. A. Raoof*—for Appellant.

M. L. Sandal—for Respondent.

Judgment.—The facts connected with this appeal are as follows: A suit was instituted in the year 1911 on foot of a mortgage. Two persons were made defendants to this suit, namely, one Mt. Kadri Begum and Nizam Uddin Shah. The usual preliminary decree was granted by the Court of first instance. Two appeals were filed in the High Court, which dismissed the suit against Nizam Uddin Shah but gave a decree against Mt. Kadri Begum. The High Court's decree was dated 17th June 1912. The Court does not appear to have been asked to extend the time and did not do so. The present application was one made on 16th March 1916. The application stated that Mt. Kadri Begum, the sole defendant, had died and that Nizam Uddin Shah was her heir. The application was one for the preparation of a final decree under O. 34, R. 5. Several objections were taken by Nizam Uddin Shah. He tried to set up that the property was wakf. He also objected that the application for the decree was beyond time and that Mt. Kadri Begum had died more than six months before the application was made. The Court below held and

we think rightly held, that Nizam Uddin Shah could not set up the plea that the property was wakf. He could only make such objections to the execution of the decree as Mt. Kadri Begum whose heir he was could have made, and she could not have raised the objection that the property was wakf. The learned Subordinate Judge overruled the other two objections based on limitation. This Court has held in a case like the present that the High Court's decree is the decree in respect of which an application for a final decree is to be made. It has also held that Art. 181, Sch. 1, Lim. Act, is the proper article and that time begins to run from the period for payment fixed by the High Court's decree: see *Gajadhar Singh v. Kishen Jiwan Lal* (1). Applying this authority to the present case time began to run from 17th June 1912.

The application was accordingly clearly beyond time. S. 6, Lim. Act, will not help the plaintiff, because that section only applies to the time for the institution of suits or the time for an application for the execution of a decree. An application for a final decree in a mortgage suit is not an application for execution of a decree. It is clear therefore that the application was beyond time. It is admitted that Mt. Kadri Begum died more than six months before the application was made. O. 22, R. 4, provides that where a sole defendant dies and the right to sue survives, the Court on an application made in that behalf shall cause the legal representatives of the deceased defendant to be made a party and shall proceed with the suit. Sub-S. (3) further provides that where within the time limited by law no application is made under sub-R. (1) the suit shall abate as against the deceased defendant. In the case of *Muhammad Masih Ullah Khan v. Jarao Bai* (2) it was held that a suit for redemption is still a "pending" suit after a preliminary decree has been made. It would therefore appear in the present case that there ought to have been an application to bring the heir of Mt. Kadri Begum on to the record within six months from the date of her death. Otherwise the suit would have abated. It is not however necessary for the decision of the present case that we should

1. (1917) 3 All. 611=12 I. C. 93.

2. A. I. R. 1915 All. 88=37 All. 226=27 I. C. 771.

decide this last mentioned point. We allow the appeal, set aside the order of the Court below and dismiss the application of the respondent. The appellant will have his costs in both Courts, including in this Court fees on the higher scale.

V.B./R.K.

Appeal allowed.

A I. R. 1918 Allahabad 78

TUDDALL AND RAFIQUE, JJ.

Basanti—Decree holder—Appellant.

v.

Kunj Bihari Lal—Judgment-debtor—Respondent.

Execution First Appeal No. 279 of 1917, Decided on 2nd March 1918, from decree of Sub-Judge, Moradabad.

Civil P. C. (1908), S. 152 — Mortgage decree—Property assessed to small revenue—Decree describing property as muafi—In execution, purchaser of property in execution of money decree objecting that property not being revenue free was not the property mortgaged—Objector not deceived burden being notified at time of his purchase—Court can correct decree.

It is the Court's duty to see that all errors in the decree are amended when there is no question of doubt. [P 78 C 2]

A mortgage-deed described the mortgaged property as muafi whereas it was assessed to a small sum of revenue. The mortgagee sued upon the basis of the mortgage and obtained a decree in which the property was again described as muafi. In execution it was objected by a previous purchaser of the property in execution of a money-decree that the property was not revenue-free and was, therefore not the property mortgaged. At the time of the objector's purchase the burden of the mortgagee's loan had been duly notified :

Held : that as the objector was not in any way deceived when he purchased the property, the burden of the mortgage having been clearly notified at the time of his purchase, it was utterly unjust to allow a slight misdescription to prevent a Court from doing what was right. [P 78 C 2]

Narain Prasad Asthana and Shiam Krishna Dar—for Appellant.

Surendra Nath Sen—for Respondent.

Judgment.—This appeal and Execution First Appeal No. 280 of 1917 cover the same point and are connected. One Jamil-ur-Rahman in the year 1910 borrowed Rs. 4,000 from Mt. Basanti, the appellant, under a mortgage deed and hypothecated certain property in two villages. The description of the property is as follows : No 1. Mauza Daranagar muafi Mahal Mustahkam Rang Surkh three biswas 15 biswansis out of 15 biswas, situate in pargana Hasanpur, district Moradabad (the names of the village on boundries of the village are

also given); No. 2. mauza Walipore, Mahal Sufaid muafi, 2½ biswas out of 20 biswas, pargana Hasanpur, district Moradabad. In this case also the bounding villages were named. The description in the mortgage-deed contained one error. These properties were not revenue free but actually were assessed to small sums of revenue. It is probable that they were commonly spoken of as revenue free. The mortgagee sued upon the basis of the mortgage and obtained a decree. The preliminary decree and the final decree described the property as it is described in the mortgage-deed. In the meantime these properties had been attached in execution of a simple money-decree against the mortgagor and were purchased in case of one village by the respondent in the present appeal, Kunj Behari Lal, and in the other by the respondents, Muhammed Hashmat Ali, etc. When proclaimed for sale the burden of the mortgagee's loan upon the property was duly notified. The mortgagee has not applied for execution of the decree by sale of the mortgaged property.

The auction-purchasers under the simple money-decree have objected that there is no muafi in these villages or mahals, that the property that they have purchased is not revenue free property and is therefore not the property mortgaged. Inquiry has been made and it is established beyond all doubt whatsoever that these properties are not revenue-free and never have been; that the description "revenue-free" entered in the mortgage-deed was a mistake, though the properties may perchance have been locally spoken of as revenue free, but it is also equally clear that the property purchased by the respondents is the property that was mortgaged to the appellant. The Court below has held that it is prevented by reason of the misdescription in the decree from putting this property to sale and has refused the decree-holder's application. It is not as if the opposite party had been in any way deceived when they purchased the property, for the burden upon it was clearly notified and we think it utterly unjust to allow a slight misdescription, such as has crept in in the present case, to prevent a Court from doing what is right. We allow the appeal. It is the Court's duty to see that all errors are amended when there is no question of doubt. The Court exe-

cutting the decree is the Court which passed the decree. We direct that the word "muafi" be struck out of the decree and direct that the Court below proceed to put the property to sale in the manner laid down by law. The appellant will have her costs in both Courts.

V.B./R.K.

*Appeal allowed.***A. I. R. 1918 Allahabad 79 (1)**

ABDUL RAOOF, J.

Baldeva—Defendant—Applicant.

v.

Panna Lal—Plaintiff—Opposite Party.

Civil Revn. No. 28 of 1918, Decided on 14th June 1918, from order of Small Cause Court Judge, D/- 5th September 1917.

Provincial Small Cause Courts Act (9 of 1887), Art. 13—Suit by zamindar to recover price of oil due by oilman under terms of *wajib-ul-arz*—Nature is of interest in immovable property—Jurisdiction of Small Cause Court is barred.

A suit by a zamindar to recover the price of a quantity of oil due by an oilman, resident in the village under the terms of the *wajib-ul-arz*, is a suit for "dues payable to the plaintiff by reason of his interest in immovable property" within the meaning of Art. 13, Sch. 2, Provincial Small Causes Court Act, and is therefore excluded from the cognizance of a Small Cause Court.

[P 79 C 2]

*Baleshwari Prasad—for Applicant.**Girdhari Lal Agarwala—for Opposite Party.*

Judgment.—Bohra Panna Lal the plaintiff in this case brought this suit against Baldeva Teli upon the following allegations: In para. 1 of the plaint he stated that the plaintiff was a zamindar co-sharer and also a lambardar in mauza Maholi Shamshegunj, Tahsil Bhagaon district Mainpuri. In para. 2 of the plaint he stated that in accordance with the condition and custom entered in the *wajib-ul-arz*, the defendant was liable to give and deliver to the plaintiff two chataks of oil daily, that is to say, 3-3/4 seers every month. In para. 3 he stated that the defendant had not complied with the condition in the *wajib-ul-arz* for the period therein stated and he therefore claimed Rs. 49.80 as the price of the oil which had not been delivered to him by the defendant. The suit was filed on 6th August 1917. In support of his claim the plaintiff filed a copy of an extract from the *wajib-ul-arz* in which the custom relied upon was en-

tered. The *wajib-ul-arz* is dated 10th September 1872 and its Ch. 4, Cl. 6 is described in these words:

"*Fasil chaharam dafa shashum raqum jo malkin ko sahinan ghair mazaran se leni jayiz hai.*"

Below this the entry is made in these words:

"*Teliyan se ile muwafiq jalane rozmarra chaupai aur dewali men bi wazan ek ser.*"

The suit was brought on the basis of this entry in the *wajib-ul-arz* and it was decreed ex parte. The present application for revision has been filed against the decree and judgment of the Court below. The ground taken before me is that the suit was not cognizable by a Court of Small Causes and reliance is placed upon Art. 13, Sch. 2 attached to the Provincial Small Cause Courts Act. The article runs thus:

"A suit to enforce payment of the allowance or fees respectively called *malikana* and *hakk* or of cesses or other dues when the cesses or dues are payable to a person by reason of his interest in immovable property or in an hereditary office or in a shrine or other religious institution."

The present suit is certainly for dues which are claimed by the plaintiff as payable to him by reason of his interest in immovable property. The plea taken in revision is a valid plea and I think it was clearly contemplated to exclude such a suit from the cognizance of a Court of Small Causes. I hold that the Court below had no jurisdiction to entertain this suit. I allow the application, set aside the judgment and decree passed by the Court below and under O. 7, R. 10, Civil P. C. I direct that the plaint be returned to the plaintiff to be presented to the Court in which the suit should have been instituted. The applicant will be entitled to his costs and I order accordingly.

V.B./R.K.

*Application allowed.***A. I. R. 1918 Allahabad 79 (2)**

TUDBALL, J.

Moti Begam—Defendant-Appellant.

v.

Har Prasad and another—Plaintiffs-Respondents.

Stamp Ref. in Second Appeal No. 872 of 1912, Decided on 26th June 1913.

Court-fees Act (1870), S. 7 (4) (c)—Mortgage suit—Defendant claiming prior charge—Suit decreed—Defendant appealing praying for declaration that he had prior charge and that property should be subject to that

charge—Defendant must pay ad valorem court-fee on amount of charge.

In a suit on foot of a mortgage one of the defendants claimed that she had a prior charge on the property sought to be sold. The defendant's contention was overruled and the suit was decreed. Defendant appealed praying for a declaration that she had a prior charge over the property and that it could only be sold subject to that charge.

Held: that the defendant's prayer was for a declaration with consequential relief and that she must therefore pay ad valorem court-fee on the amount of the charge claimed by her.

[P 81 C 2]

A. Raoof—for Appellant.

Office Report.—The suit out of which this appeal has arisen was brought by the plaintiff for recovery of Rs. 2,500 on account of principal and interest on foot of a mortgage, dated 4th May 1893, by enforcement of hypothecation lien. Mt. Moti Begam, one of the defendants, defended the suit on the allegation that the property sought to be sold was conveyed to her as security for her dower-debt under a prior bond executed by her deceased husband, Sayed Hasan, on 9th February 1892, which bond was subsequently renewed by the heirs of her deceased husband on 5th August 1910. The said defendant contended that the property could not be sold until payment of the money due to her on account of her dower-debt secured by the deed of mortgage which she put up as a shield. The suit was valued at Rs. 2,500, and a court-fee of Rs. 150 was paid thereon. At the trial of the suit the Court held that the plaintiff's mortgage was prior and decreed the plaintiff's suit. A decree was accordingly passed for sale of the mortgaged property under O. 34, R. 4. Mt. Moti Begam appealed to the lower appellate Court, setting up inter alia a plea of priority and genuineness of the mortgage held by her. The lower appellate Court modified the decree of the Court of first instance by extending the time for payment of the decretal amount, and in other respects the appeal was dismissed.

The appeal was valued at Rs. 2,500, and a court-fee of Rs. 150 was paid thereon. The proper valuation of the appeal was Rs. 2,519 inclusive of interest from date of suit to date fixed for payment of the decretal amount awarded in the decree appealed from, and a court-fee of Rupees 155 was payable upon that valuation. Rs. 150 having been paid, there is therefore a deficiency of Rs. 5 to be made good

by the defendant-appellant for the lower appellate Court. Mt. Moti Begam has preferred this second appeal and the relief sought by the appeal is that the Hon'ble Court will be pleased to allow the appeal and declare that the appellant has a prior charge for the amount of her dower-debt and the property can be sold only subject to her charge. The appeal is valued at Rs. 2,500, and a fixed fee of Rs. 10 has been paid, apparently on the ground that a mere declaration is sought by this appeal. I think a court-fee of Rs. 10 paid in this Court is quite inadequate. The defendant-appellant seeks by this appeal to go behind the decrees of the Court below, decreeing the plaintiff's claim for sale of the mortgaged property and declining to accept the plea set up by the defendant in the Court below and repeated in this Court in a somewhat different form. The suit was a suit for sale on a mortgage on the basis of which the Courts below have passed a decree in plaintiff's favour. The defendant comes to this Hon'ble Court in second appeal, and by making a prayer in the form of a declaration wants to get rid of those decrees. Assuming that the defendant-appellant does not state in distinct words that the decrees below should be set aside, one should see what will be the consequence, if the declaration prayed for, be granted. Leaving out the question that the appellant is avoiding the decree passed against her, it is evident that the property will be subjected to a double charge created by the mortgages held by the parties and out of sale proceeds the plaintiff may not get anything after meeting the prior charge of the defendant.

I am quite certain that the appellant is seeking for a declaration with a consequential relief, and, as such, she must pay ad valorem court-fee of Rs. 175, on the amount of her mortgage, i. e., Rupees 3,000. Rs. 10 having been paid, there is therefore a deficiency of Rs. 165 due from defendant-appellant for this Court. Total deficiency due from defendant appellant for this Court and lower appellate Court is Rs. 170.

The following objections to the report of the Stamp Reporter were raised by counsel for the appellant:—1. The object of the appeal is not to get rid of the decrees of the Courts below nor does the appellant seek:

"by this appeal to go behind the decrees of the Courts below decreeing the plaintiff's claim for sale of the mortgaged property,"

as remarked by the Stamp Reporter. 2 The appellant is desirous that the decree for the sale of the property may be allowed to remain intact but it may be declared that her dower-debt is a prior charge. Almost a similar question arose in a case of *Rup Chand v. Fateh Chand* (1) and it was decided that a Court fee of Rs. 10 on the memorandum of appeal was sufficient. 3. Having regard to the above circumstances the Court-fee of Rs. 10 paid by the appellant on the memorandum of appeal is sufficient. 4. The Court-fee in the Court below was paid on the amount of the mortgage money under S. 7, Court Fees Act and was sufficient and the Stamp Reporter is not justified in demanding any Court fee on the amount of interest on the memorandum of appeal either in this Hon'ble Court or in the Court below.

Reply of Stamp Reporter.—In submitting the papers to you under S. 5, Court Fees Act, I beg to add that the ruling relied upon by the learned Counsel has no application at all to this case, and that according to the long standing practice of this Court ad valorem Court fee is always charged on pendente lite interest. I cite two cases, viz, *Nepal Rai v. Debi Prasad* (2) and *Baji Lal v. Gobardhan Singh* (3). These are converse cases. In these cases the appellants sought to get rid of the liability imposed by the decrees appealed against, while in the present case the appellant is seeking to impose a further liability on the property in suit. In the second ground of appeal the appellant distinctly assails the concurrent findings of the Courts below that the right of the appellant under the deed was barred by time and extinguished for all purposes under the law. The relief sought by the appeal may be read thus:—It may be declared that the appellant has a prior charge for the amount of her dower-debt and that the property can be sold only subject to her charge by reversing the concurrent findings of the Courts below, in so far as they affect her deed, on the ground set forth in the memorandum of appeal.

I most respectfully submit that a very substantial consequential relief is involved

1. (1911) 93 All 705=11 I C 977.

2. (1905) 27 All 447.

3. (1909) 81 All 265=1 I C 1000.

in the case and under S. 7, Cl. (4) (c), read with Cl. 1, Court Fees Act, the appellant must pay ad valorem Court-fee on the amount of her own deed amounting to Rs. 3,000. If the appeal prevails and the Hon'ble Court holds that the appellant has a prior charge and directs the property to be sold subject to her prior charge, the appellant may apply for sale of the property under O. 34, R. 12, and the Court acting under O. 34, R. 13, may first satisfy the prior charge out of the sale-proceeds and then give the balance to the plaintiff-respondent. If the law allows such a procedure, the appellant will get her mortgage money on payment of Rs. 10 without bringing a fresh suit. In any case I most humbly submit that it is manifestly a case in which the appellant is not only trying to get rid of the liability imposed upon her by the decree but to impose a further liability on the property, and as such the appellant must pay ad valorem Court-fee on the further charge thus imposed.

Note by the Taxing Officer.—I have heard the learned Counsel and am not convinced by his arguments. In the appeal to the District Judge, Saharanpur, full Court-fee was paid. In this appeal the whole of the decree is attacked by the second ground. I agree with the Stamp Reporter that the full Court-fee should be paid on this appeal, but Mr. A. Raoof maintains that he seeks merely a declaration and that the case is one of general importance in view of the Full Bench ruling, *Ram Shanker Lal v. Ganesh Parsad* (4). At his request I submit the question for the decision of the Hon'ble Taxing Judge. The Stamp Reporter should quote the rulings on which he relies.

Judgment.—The amendment has been made. Court-fee must be paid on the amount of the prior charge. I allow two days to make good the deficiency.

V.B./R.K. *Order accordingly.*

4. (1907) 29 All 335 (FB).

A. I. R. 1918 Allahabad 81

BANERJI AND ABDUL RAOOF, JJ.

Gobardhan—Defendant—Appellant.

v.

Manna Lal—Plaintiff—Respondent.

Second Appeal No. 1600 of 1916, Decided on 30th April 1918, from the decree of Dist. Judge, Agra.

Civil P. C. (1908), O. 34, R. 1—Person claiming paramount title is not a necessary party—

Question of paramount title cannot be decided.—Subsequent suit for declaration of paramount title to mortgage property by subsequent mortgagee is not barred by *res judicata*—Civil P. C. S. 11.

In a suit brought by a mortgagee to enforce his mortgage a person claiming a title paramount to the mortgagor and the mortgagee is not a necessary party and the question of the paramount title cannot be litigated in such a suit. [P 83 C 2]

S. mortgaged 4 biswas of land to M. and subsequently mortgaged one biswa out of the four to L. M. brought a suit on his mortgage in which he impleaded L. as a defendant. The latter did not appear, but S. objected that three biswas out of the four biswas mortgaged by him belonged to L. and that he had no right therefore to mortgage those three biswas to M. The Court held that S. was estopped from pleading that the whole four biswas did not belong to him and passed a decree for sale of the whole land. L. then brought a suit for a declaration of his title to the three biswas of land and that the mortgagee had no right to sell those three biswas:

Held: that L. was not precluded from setting up his title to the three biswas inasmuch as he had not been impleaded in the mortgage suit as a person claiming paramount title but only as a subsequent mortgagee of one biswa of land and that his title to the other three biswas was neither set up by him nor could it be decided in that suit. [P 84 C 1]

A. H. C. Hamilton and Sheo Dihal Sinha—for Appellant.

Narayan Prasad Asthana—for Respondent.

Judgment.—This appeal arises out of a suit brought under the following circumstances. Sohan Lal and Shiam Lal, defendants executed two mortgages in favour of Misri Lal and Murli on 20th October 1906 and 8th April 1908 respectively. In both mortgages the same property namely $4\frac{3}{4}$ biswas of Mauza Behta Mahal Munna Lal was mortgaged. Subsequently to these mortgages, the mortgagors mortgaged a one-biswa share out of the aforesaid $4\frac{3}{4}$ biswas in favour of Munna Lal. The mortgagees brought two separate suits on the basis of the two mortgages but impleaded as defendants to each suit not only the mortgagors but Munna Lal also. Munna Lal was made a party to each of these suits as subsequent mortgagee of a one biswa share. The first suit was decreed on 25th January 1913 and the second on 26th March 1914. In the first suit Munna Lal did not appear but the mortgagors raised the plea that they were the owners of a one biswa share only and were not competent to mortgage the remaining $3\frac{3}{4}$ biswas which they alleged belonged to Munna Lal. The Court framed an issue as to the extent of the mortgagor's rights and the validity of

the mortgage as regard $3\frac{3}{4}$ biswas and decided that the mortgagors were estopped from asserting that the whole of the property which they professed to mortgage, did not belong to them. In the course of the judgment the Court made some remarks as to Munna Lal's rights and in the end made a decree for the sale of the whole of the mortgaged property namely the $4\frac{3}{4}$ biswas share in Mauza Behta. In the second suit brought upon the second mortgage, Munna Lal did appear and he put forward the contention that the $3\frac{3}{4}$ biswas belonged to him and that the mortgagors had no right to mortgage that share.

The Court held that as Munna Lal set up a paramount title as regards the $3\frac{3}{4}$ biswas share, the question of his title could not be tried in the suit, and refused to try it, but it made a decree for the sale of the $4\frac{3}{4}$ biswas. In that suit the Court distinctly said that Munna Lal's remedy was to bring a suit of his own to try the question of his title. The present suit was thereupon instituted by Munna Lal and he asked for a declaration that the mortgagors were the owners of only a one-biswa share and that the mortgagees had no right to put to auction sale in execution of the two decrees obtained by them, any portion of the remaining $3\frac{3}{4}$ biswas share which he alleged belonged exclusively to him and not to the mortgagors: Both the Court of first instance and the lower appellate Court found that the $3\frac{3}{4}$ biswas claimed by the plaintiff belonged to the plaintiff and that the mortgagors Sohan Lal and Shiam Lal were owners of one biswa only. It was contended in the Courts below that the previous decrees obtained by the mortgagees operated as *res judicata* and the question of the plaintiff's alleged title could not be re opened and litigated in a separate suit brought by the plaintiff. This plea was overruled by the Courts below. It has been repeated in the appeal before us. Mr. Hamilton who appears for the appellants has conceded that as in the second suit brought on the basis of the second mortgage decided by the Subordinate Judge on 26th March 1914 the Court distinctly refused to try the issue as to the title of Munna Lal in respect of $3\frac{3}{4}$ biswas, the decision in that case cannot be held to be *res judicata*; but he contends that the decision in the earlier suit has the effect of *res judicata*. As we

have said above, both the Courts below have found that the property claimed by the plaintiff Munna Lal belongs to him.

We have therefore to consider whether Munna Lal is precluded by any provisions of law from putting forward the title which has been found to exist in him and in respect of which we are bound to accept the finding of the Court below. In order to determine whether the question of Munna Lal's title is *res judicata*, we have to see whether in the previous suit this question was directly and substantially in issue. We must take it as settled law that in a suit brought by a mortgagee to enforce his mortgage a person claiming a title paramount to the mortgagor and the mortgagee is not a necessary party and the question of the paramount title cannot be litigated in such a suit. We may refer to the decision of this Court in *Joti Prasad v. Aziz Khan* (1). That case followed a ruling of the Calcutta High Court in *Jaggewar Dutt v. Bhuban Mohan Mitra* (2). It is true that in the present instance Munna Lal was made a party to the suit brought by the mortgagees on the basis of first mortgage, but he was made a party not as a person claiming a paramount title but as subsequent mortgagee of a one biswa share and thus representing the mortgagors as regards that share. As such representative, he could not raise the question of his paramount title. That apparently was the reason why he did not appear in the suit. He filled two capacities in that litigation; viz., first, that of a subsequent mortgagee and as such representing the mortgagor as regards a part of the mortgaged property; and secondly as a person setting up a paramount title in respect of 3 3/4th biswas. The question of his paramount title could not be litigated in that suit. Therefore no issue could be framed in regard to that question and no such issue could be determined as an issue which arose directly and substantially, as between him and the mortgagee. The mortgagors, it is true, asserted that Munna Lal owned a 3 3/4th biswa share and that they, the mortgagor, were not competent to mortgage that share and to the extent of that share, the mortgage was invalid. It is in reference to this plea that an issue was framed as to the right of the mortgagors to mortgage the whole of the 4 3/4th-biswas. The Court decided that

the mortgagors who had made the mortgage, were estopped from questioning the validity of the mortgage and asserting that they were not the owners of the property which they mortgaged on the representation that they were the owners thereof. In the course of the judgment, the learned Subordinate Judge made some observation in respect to Munna Lal but these observations were nothing more than obiter dicta and could not as between the mortgagees and Munna Lal be treated as a decision on the question of the paramount title of Munna Lal. In this view, it cannot be said that the question of Munna Lal's title has become *res judicata* by reason of the decision in the previous suit. It may be, as observed in *Jaggewar Dutt v. Bhuban Mohan Mitra* (2), that if Munna Lal had allowed the question of his paramount title to be determined in the suit, he might not be permitted in appeal to contend that the decree of the Court below was vitiated by reason of the determination of that question, but that was not the case here. In the present suit Munna Lal did not appear and he did not put into issue the question of his title in respect of the the 3 3/4th biswa share. That question, therefore remained an open question as between him and the mortgagee and he is entitled in a subsequent suit to raise the same question.

It is true that the decree in the previous suit was a decree for the sale of the whole of the 4 3/4th biswas, but that is the only decree which could be made in the previous suit and so far as the 3 3/4-biswa share is concerned, Munna Lal must be treated as if he was not a party to the previous suit. The principle of the decision of the Calcutta High Court in *Girija Kanto Chakrabatty v. Mohim Chandra Acharjya* (3) is applicable to the present case. There in a suit by a mortgagee the legal representative of one of the mortgagors who had died, was made a party as representing the mortgagor. A decree was obtained against him and the property was sold. The auction-purchaser having been resisted in obtaining possession of a portion of the property sold, brought a suit for possession. In that suit the representative of the mortgagor, who had been a party to the previous suit, set up an independent title to the property claimed. It was

(3) [1916] 35 I. O. 294.

(1) [1903] 31 All. 11=1 I O 53.

(2) [1906] 33 Cal. 425.

held that he was not precluded from raising the question of his title by reason of the previous decree passed against him.

In this case Munna Lal was a party to the suit as representing the mortgagor in respect of a one-biswa share. He could not be made a party as claiming paramount title to the remaining 3 3/4 biswas. The fact of a decree having been passed against him as representative of the mortgagors, could not upon the principle of the ruling to which we have referred and on general principles, precludes him from bringing a suit of his own to try the question of his title, and the Court from granting a decree to him in respect of the title which it has found to exist. In this view we are of opinion that the appeal must fail. We accordingly dismiss it with costs.

V.B./R.K.

Appeal dismissed.

A I R. 1918 Allahabad 84

RICHARDS, C. J. AND BANERJI, J.

Deo Narain Singh and others—Defendants—Appellants.

v.

Sitla Baksh Singh and others—Plaintiffs—Respondents.

Second Appeal No. 429 of 1915, D/. 25th May 1916, from a decree of Dist. Judge, Benares.

Agra Tenancy Act (1901), Ss. 95 and 177 (F)—Plaintiff being directed by civil Court under S. 202 to bring suit in revenue Court—Plaintiff filing suit under S. 95—Defendant objecting as to jurisdiction but objection overruled—Appeal does not lie to District Judge.

A defendant in a revenue suit cannot be allowed by formally raising an untenable plea of jurisdiction to take the case from the Revenue Court to the civil Court.

Plaintiff was directed by a civil Court, under S. 202 to bring a suit in the Revenue Court for determination of the nature of his tenancy. He thereupon brought a suit under S. 95 of the Act which was heard by an Assistant Collector. The defendant objected that the Revenue Court had no jurisdiction to hear the suit, but the objection was overruled:

Held: that the suit being one under S. 95, Agra Tenancy Act and having been brought in compliance with an order of the civil Court could be heard only by a Revenue Court, and that no question of jurisdiction had therefore, been decided by the Revenue Court so that an appeal against the decision of the Revenue Court did not lie to the District Judge under S. 177, Cl. (f)

[P 84 C 2]

Haribans Sahai—for Appellants.

A. P. Dube—for Respondents.

Judgment.—This appeal arises under the following circumstances. The pre-

sent defendants brought a suit in the civil Court for possession against the plaintiffs as trespassers. The latter pleaded that they held the land as tenants to the plaintiffs. The civil Court thereupon made an order directing the defendants in that suit to institute within three months a suit in the Revenue Court for determination of the question. This order was made under the provisions of S. 202, Tenancy Act. This suit was thereupon instituted asking for a declaration of the nature of the tenancy under S. 95, Tenancy Act. An objection was taken as to his jurisdiction to hear the suit, which he at once overruled. He then dealt with the suit and made a decree. An appeal was preferred to the District Judge and cross-objections filed by the other side. The learned District Judge entertained the appeal on the ground that a question of jurisdiction had been decided. He then dealt with the case on the merits. An appeal has been preferred by the defendants and the plaintiffs have filed cross objections. In our opinion no question of jurisdiction was in reality decided by the Assistant Collector. In the first place the suit was brought in compliance with the order of the civil Court that a suit should be instituted in the Revenue Court. In the next place the suit was under S. 95, Tenancy Act, which Act expressly provides that suits under S. 95, must be brought in the Revenue Court and no other. It was therefore absolutely absurd to contend that the Revenue Court had no jurisdiction to hear the present suit. It would be reducing matters to an absolute absurdity to hold that the defendants in a revenue suit could by formally raising an absolutely untenable plea of jurisdiction take every case from the Revenue Court to the civil Court. We accordingly allow the appeal to this extent that we set aside the decree of the learned District Judge and remand the case to him with directions to return the memorandum of appeal and the cross-objections for presentation to the proper Court. Costs here and heretofore will be costs in the cause.

V.B./R.K.

Case remanded.

A. I. R. 1918 Allahabad 85 (1)

BANERJI, J.

Manohar—Applicant.

v.

Emperor—Opposite Party..

Criminal Revn. No. 222 of 1918, Decided on 23rd May 1918, from order of Sess. Judge, Jhansi.

Penal Code (1860), S. 182—Applicability—Petition to District Magistrate to unlock house—Police reporting that allegations were false—S. 182 does not apply and prosecution under that section cannot be sanctioned.

Section 182, Cl. (a), applies to a case in which it is intended that a public servant should do or omit to do something which he ought to do or omit to do if he knew the true facts, that is which he would be legally justified in doing or omitting to do if he knew the true facts. Asking a Magistrate to do an illegal act even if true facts were stated to him, would not come within the purview of the section. Accused petitioned the District Magistrate praying that as certain tenants occupying his houses had absconded leaving the houses locked up, the houses might be unlocked to enable him to execute the necessary repairs. His application was sent for compliance and report to the police, who reported that the allegations contained in the petition were untrue, upon which the District Magistrate sanctioned his prosecution under S. 182:

Held: that the section was inapplicable to the circumstances of the present case. (P 85 C 2)

Satya Chandra Mukerji — for Applicant.

R. Malcomson—for the Crown.

Judgment.—The applicant, *Manohar* has been convicted under S. 182, I. P. C., under the following circumstances. He submitted a petition to the District Magistrate in which he stated that certain tenants occupying his houses had absconded, leaving the houses locked up, and he prayed that the houses might be unlocked and opened to enable him to execute repairs, as otherwise the houses would fall down when the rains began. The application was sent to the police for compliance and report. The Sub-Inspector reported that the allegations in the petition were untrue. Thereupon the District Magistrate sanctioned the prosecution of the accused under S. 182, I. P. C., and he was tried and convicted. The question is whether the conviction is legal. Under S. 182 a person who gives to a public servant any information which he knows or believes to be false, intending thereby to cause, or knowing it to be likely that he will thereby cause, such public servant to do any of the things mentioned in Cl. (a) or Cl. (b), of the section, would be liable to punishment. In this case it is

not alleged that Cl. (b) is applicable. The question is whether Cl. (a) applies. Under that clause the false information must have been given with the intention or the knowledge that the public servant would do or omit anything which he ought not to do or omit if the true facts were known to him. In the present case if the true state of facts were known to the District Magistrate, he would not be legally competent to issue the order which he issued or which was asked for. It is equally clear that he would not be competent to make the order if the information given to him was untrue. It seems to me that Cl. (a), S. 182 applies to a case in which it is intended that a public servant should do or omit to do something which he ought to do or omit to do if he knew the true facts, that is, which he would be legally justified in doing or omitting to do if he knew the true facts. Asking a Magistrate to do an act which would be an illegal act even if true facts were stated to him would not, it seems to me, come within the purview of the section. The information must be information regarding a fact which would induce the Magistrate to do something which he would be legally competent to do if he had been cognizant of the true facts. As I have already stated, if the true facts were before the Magistrate he could not have issued the order which he issued to the police. By reason of the true facts not being stated he issued an order which he could in no case have issued. Therefore it seems to me that the present case is not a case to which the section applies. I allow the application set aside the conviction and sentence, and direct that the fine imposed on the applicant if paid be refunded.

V.B./R.K. *Application allowed.*

A. I. R. 1918 Allahabad 85 (2)

BANERJI, J.

Babu Ram—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 223 of 1918, Decided on 31st May 1918, from order of Sess. Judge, Farrukhabad.

U.P. Municipalities Act (2 of 1916), S. 155—Octroi duty—Person introducing goods into limits of Municipality e.g. broker is liable to pay.

The person liable to punishment under S. 155 is the person who introduces the goods into the

limits of the Municipality without payment of octroi duty.

Where the broker of a consignee took delivery of certain goods without paying octroi duty in respect thereof:

Held: that he was guilty of an offence under S. 155. [P 86 C 1]

Satya Chandra Mukerji—for Applicant.

R. Malcomson—for the Crown.

Judgment.—The applicant Babu Ram has been convicted under S. 155, Municipalities Act, No. 2 of 1916, on a charge of having introduced into the limits of the Municipality certain bags of sugar without payment of octroi duty. It has been fully proved by the evidence, which the Court below has believed, that the applicant, who is a broker, took delivery of sixty bags of sugar and did not pay the octroi duty payable for the goods. It is said that as he was merely a broker and the agent of the consignee, the consignee should have been punished. This contention is, in my opinion, not tenable. The person liable to punishment is the person who introduces the goods into the limits of the Municipality without payment of octroi duty. It was the accused who did this, and therefore he has been rightly convicted. I do not consider the fine inflicted on him to be unduly excessive having regard to the circumstances of the case. The application is dismissed.

V.B./R.K. *Application dismissed.*

A. I. R. 1918 Allahabad 86

PIGGOTT AND WALSH, JJ.

Mir Dad Khan and another—Defendants—Appellants.

v.

Ramzan Khan and others—Plaintiffs—Respondents.

First Appeal No. 149 of 1916, Decided on 9th March 1918, from decree of Addl. Sub-Judge, Aligarh, D/- 26th January 1916.

Agra Tenancy Act (1901), Ss. 10, 20 and 21—Object of S. 10 is to secure and preserve right of occupancy to ex-proprietor—Mortgage of sir land—Covenant to put mortgagee in possession—Simultaneous deed of relinquishment of rights of ex-proprietary tenancy—Transactions in two deeds are in substance one and are void.

The object of S. 10 is that a right of occupancy should be secured and preserved to a proprietor who becomes by a transfer the ex-proprietor, whether he wishes it to be secured and preserved to him or not, and notwithstanding any agreement to the contrary between himself and the transferee. If a covenant to relinquish the sir

lands is part of a transaction of sale or of mortgage, then the agreement to surrender will be void and unenforceable, no matter what ingenious devices may be employed to give colour to it. If the Court is satisfied that there was first of all a transfer by way of sale or mortgage and that the transferee, having obtained the status of an ex-proprietary tenant, with full knowledge of that fact and of the rights preserved to him by the statute, deliberately chooses, as a separate transaction, to relinquish his ex-proprietary tenancy into the hands of new proprietor, or of the mortgagee in possession, then the law cannot go further in the way of protecting a reckless and imprudent man against consequences of his own acts. [P 87 C 1, 2]

A zamindar executed a usufructuary mortgage of a part of his sir lands for Rs. 8,000 and covenanted to put the mortgagee in actual cultivating possession of the land and not to assert his rights as an ex-proprietary tenant. By a deed of relinquishment executed on the same date the mortgagor purported to surrender or to relinquish in favour of the mortgagee, in return for a consideration of Rs. 1,000, his rights as an ex-proprietary tenant in the mortgaged lands. It was found that the mortgagee held a decree for Rs. 9,000 against the mortgagor, which was satisfied by the execution of the mortgage deed and the deed of relinquishment.

Held, that the transactions in the two deeds were in substance one transaction, and that the deed of relinquishment and the covenant to put the mortgagee in actual possession of the mortgaged land, being devices to evade the provisions of S. 10, were void and unenforceable. [P 88 C 1, 2]

Panna Lal—for Appellants.

M. L. Agarwala and G. L. Agarwala—for Respondents.

Piggott, J.—The suit out of which this first appeal arises is based upon the following state of facts: Mir Dad Khan and others were the owners of proprietary rights in a certain Mahal. Appurtenant to those proprietary rights was a considerable area of land of which these zamindars were in possession either as sir or khudkasht. With reference to the khudkasht land it is sufficient to say that it was land which had been held by the proprietors in their own cultivation for the full statutory period and which had therefore acquired the essential character of sir land, so far as S. 10, Local Tenancy Act, 2 of 1901 is concerned. For purposes of brevity therefore it will be convenient hereafter to speak of these lands as the sir lands of Mir Dad Khan and others. Now these proprietors were indebted, and the evidence on the record shows that there was a decree out against them for a sum of Rs. 9,000 held by Thakur Das and others. The proprietors endeavoured to come to terms with these creditors and I do not think that there can be any doubt as to the nature of the

arrangement effected. The creditors were willing to accept a usufructuary mortgage for Rs. 9,000 that is to say, for a sum sufficient to pay off their decree provided that the land mortgaged, being 30 bighas of the sir land of the debtors, should pass into their actual cultivating possession. In endeavouring to effect such a transaction the parties concerned had to get round the difficulties placed in their way by statute, that is to say, by the Local Tenancy Act, and particularly by Ss. 10 and 20 of that Act. It so happens that the law on this point has been recently settled by the highest possible authority in the case in *Moti Chand v. Ikram Ullah Khan* (1). So far as I am concerned I think I am entitled to say that there is nothing in the propositions of law there laid down other than I have been consistently asserting for some years past, or other than were given effect to by Tudball, J. and myself in the case of *Dipan Rai v. Ram Khelawan Rai* (2).

Their Lordships of the Privy Council, in deciding the case before them, by no means overlooked the provisions of S. 83, Tenancy Act, according to which a tenant may at the end of any agricultural year surrender his holding to his proprietor. What they point out is that this right of surrender cannot be permitted to be used in such a manner as to defeat the provisions of the law by which ex-proprietary tenancies are created. They point out that the policy of Act 2, 1901 is to secure and preserve to a proprietor, whose proprietary rights in a Mahal, or in any portion of it, are transferred, otherwise than by gift or exchange between cosharers in the Mahal, a right of occupancy in his sir lands. Such right of occupancy is secured and preserved to the proprietor, who becomes by a transfer the ex-proprietary tenant whether he wishes the right to be secured and preserved to him or not, and notwithstanding any agreement to the contrary between him and the transferee. It is further pointed out that the Courts must not allow the policy of the act to be defeated by any ingenious devices, arrangements or agreements between a vendor and a vendee for the relinquishment by the vendor of his sir land. They go on

to point out, more particularly, that devices to compel such a surrender by the inclusion in the deed of transfer of provisions amounting to a penalty against the transferor, in the event of his failing to relinquish the ex proprietary tenancy, must also be regarded as devices or arrangements for defeating the policy of the Act. Cases in which attempts have been made, more or less openly, to evade the provisions of the law on the subject of ex-proprietary tenancies do from time to time come before the Courts, and we have to notice more particularly the decision of a Bench of this Court in *Lekhraj v. Parshadi* (3), in which it would appear that a transaction which one might at least suspect of having been of this nature was given effect to by the Court.

According to their Lordships of the Privy Council I take the true test to be this: If a covenant to relinquish the sir lands is part of the transaction of sale or of mortgage then the agreement to surrender will be void and unenforceable, no matter what ingenious devices may be employed to give colour to it. If the Court is satisfied that there was first of all a transfer by way of sale or mortgage and that the transferee, having obtained the status of an ex-proprietary tenant, with full knowledge of that fact and of the rights preserved to him by the Statute deliberately chooses, as a separate transaction, to relinquish his ex-proprietary tenancy into the hands of the new proprietor, or of the mortgagee in possession, then the law cannot go further in the way of protecting a reckless and imprudent man against the consequences of his own acts.

In the present case what we have to consider is the nature of the agreement actually entered into between Thakur Das and his fellow creditors on the one hand and Mir Dad Khan and his fellow zamindars on the other. Two documents were executed on one and the same date, namely, 19th June 1913. By one of these documents the proprietors covenanted to mortgage with possession 30 bighas of land forming part of their sir lands. They declared themselves to have put the mortgagees in actual possession of the land in question, surrendering all their rights in the sir and khudkasht. They further covenanted that, if the mortgagees should fail to obtain posses-

3. (1909) 2 I O 409.

1. A I R 1916 P O 59=39 All 173=39 I O 454 (P. O.)

2. (1910) 82 All 888=5 I O 557.

sion, or if the mortgagors should after all not give up the sir from their own cultivation, or should set up any claim to hold it as ex-proprietary tenants, then the mortgagees should be entitled to sue for their mortgage money with heavy interest and to enforce the same by sale of the proprietary rights of the mortgagors, not merely in the 30 bighas of land already referred to, but in a total area of 63 bighas odd belonging to the mortgagors. The consideration for this document was stated at a sum of Rupees 8,000. A further attempt was made to safeguard the mortgagees in any event, against a possible refusal on the part of the mortgagors to carry out the contract in its entirety. The mortgagees did not content themselves with taking a usufructuary mortgage pure and simple. They inserted a covenant that, in spite of their right to obtain possession of the 30 bighas of land and to enjoy the usufruct in lieu of interest, they should nevertheless be entitled at any time to sue for the principal of their mortgage debt and to bring to sale the proprietary rights of the mortgagors in the area of 30 bighas, which were formally hypothecated as security for the debt. The other document of the same date was a deed of relinquishment, by which the mortgagors under the former deed purported to surrender or to relinquish in favour of the mortgagees, in return for a consideration of Rs. 1,000, their rights as ex-proprietary tenants in the 30 bighas of sir land in question.

Whatever doubt there may be in particular cases as to the precise nature of the transaction entered into, it seems to me that there is no room for doubt in the present case. The total sum of money which Mir Dad Khan and his fellow zamindars owed to Thakur Das and others was Rs. 9,000 and this was distributed between the two deeds, the mortgage deed and the deed of relinquishment. Moreover, the mortgage-deed itself contained, not merely an express stipulation to put the mortgagees in actual cultivating possession of the sir lands, but a penalty clause binding the mortgagors not to assert their rights as ex-proprietary tenants. The transaction therefore was one single transaction effected under cover of two deeds. It was a determined attempt to evade "by ingenious devices and arrangements," as their Lordships of

the Privy Council have put it, the provisions of Ss. 10 and 20 of Act No. 2 of 1901. It is quite immaterial that, according to the terms of the two documents, the surrender purports to have been actually effected. In any such attempt to get round the provisions of the law the transferee is certain to insist upon a statement that he has actually been put in possession and that the surrender which he desires has actually been effected. I must note however that the mortgage-deed in question is not a usufructuary mortgage pure and simple; to a certain extent it is a combination of a simple and a usufructuary mortgage, and is therefore what the Courts in India commonly speak of as an anomalous mortgage. We are principally concerned in the present case with the effect of this document as a usufructuary mortgage. On the principles laid down by their Lordships of the Privy Council all the stipulations about the surrender of ex-proprietary rights and about the transfer to the mortgagees of actual cultivating possession over this area of 30 bighas are void and unenforceable. The penalty clause goes along with the rest, being strictly analogous to the sort of device spoken of by their Lordships of the Privy Council at the close of the judgment already referred to, whereby the vendor covenants to make himself liable to a suit for breach of contract on his failing or refusing to carry out the stipulated relinquishment of his ex-proprietary rights.

Such a stipulation would, in the opinion of their Lordships, be void and unenforceable. I can see nothing in the stipulation in the deed in suit by which the mortgagors bound themselves, in the event of their setting up any claim to possession as ex-proprietary tenants, to submit to a decree for sale against their proprietary rights in an area of 63 bighas odd, to distinguish it from a stipulation that they should be liable to a suit for damages, or to any other kind of penalty, in the event of their failure to relinquish. In the view of the case which I take I am by no means disposed to differ from such decisions as that which we have been referred to, viz., *Rajendra Prasad v. Ram Jatan Rai* (4), where a mortgage affecting some property which was transferable, along with other pro-

perty which was by law non-transferable was allowed to be enforced against the former of the two properties. I do not say for a moment that the mortgage deed in suit, regarded as a usufructuary mortgage, was altogether void and of no effect. What it gave the mortgagees was the right affirmed by Tudball, J. and myself in *Dipan Rai v. Ram Khelawan Rai* (2), namely, the right to proprietary possession in respect of this area of 30 bighas and the right to have rent assessed thereon upon the mortgagors as ex-proprietary tenants and to receive and enjoy the said rent in lieu of interest on their money. This was no doubt less than the mortgagees wanted and hoped to secure by the transaction, but it was the legal effect of the transaction actually entered into, in view of the provisions of S. 10, Tenancy Act by which the ex-proprietary tenure was preserved to the former proprietary, "whether he wished it or not," as the Privy Council have said.

We have been asked however to consider further the anomalous nature of this mortgage and the legal effect of hypothecation of the proprietary rights in this area of 30 bighas as security for repayment of the principal loan. For reasons which I shall have to state presently I do not think that any decision on this point is necessary to the determination of this appeal. My own opinion undoubtedly is that the original mortgagees, Thakur Das and others, could have enforced this stipulation. They could have taken up the position that the contract of mortgage which they had entered into was a usufructuary mortgage combined with a simple mortgage; that they had made a mistake in attempting to evade the Statute law by the terms of their usufructuary mortgage, and that they therefore claimed to fall back upon the document as a simple mortgage and to ask for a decree on that basis. It may however be noted at the same time that this remedy would have been worth extremely little to the mortgagees. If the proprietary rights of Mir Dad Khan and his fellow zamindars in this area of 30 bighas had been brought to sale on a decree enforcing the hypothecation of the same for re-payment of the loan of Rs. 8,000, the sale itself would at once have given rise in favour of the mortgagors to this very ex-proprietary tenure

which it was the object of the deed in suit to get round. The purchaser at auction, whether Thakur Das or another, would have had to be content with the rent assessed by the Collector on this ex-proprietary tenure as representing to him the usufruct of the property purchased. This right the original mortgagees could have enjoyed as mortgagee under the usufructuary part of the mortgage, and it would not have made much difference to them to have endeavoured to work out the same result by enforcing the hypothecation lien, if that were limited (as it must be limited apart from the penalty clause) to the proprietary rights in the area of 30 bighas. The case now before us is not between the mortgagors and the original mortgagees. The plaintiffs, who are the respondents to this appeal, were co-sharers in the same Mahal, and the transfer of the proprietary rights of Mir Dad Khan and others by way of usufructuary mortgage gave rise to a right of pre-emption on their part. This right they claimed to enforce and they brought a suit accordingly. That suit was finally settled by a compromise and the compromise decree, which is dated 16th June 1914, gives these plaintiffs as pre-emptors the right of possession as mortgagees over the property pre-empted that is to say, over the 30 bighas of sir land in suit.

It gives them nothing more: even if what I have called the penalty clause of the original contract of mortgage were enforceable by the original mortgagees, which I believe it was not, there is nothing in this decree to make it enforceable by the pre-emptors. Still less does this decree give the plaintiffs any right, under the mortgage-deed of 19th June 1913, to bring the property to sale under the hypothecation effected in the earlier part of the said deed. I doubt whether an alienation by way of simple mortgage would have given rise to any right of pre-emption. The presumption is that persons possessing the right of pre-emption would have had to wait until the property was brought to sale in enforcement of the hypothecation lien, and then to have asserted any rights of pre-emption which they might claim. However this may be, the pre-emption decree actually passed does not transfer to these plaintiffs any rights as simple mortgagees in respect of the land in suit.

In the suit as brought the plaintiffs claims the full benefit of the terms of the mortgage of 19th June, 1913. They say that they are entitled to actual possession over the area of 30 bighas in question or, failing this, that they are entitled to recover the mortgage debt of Rs. 8,000 with interest at 2 per cent. per mensem under the penalty clause of the mortgage deed, by sale of the area of 63 bighas odd referred to in that clause. The learned Subordinate Judge who tried the case was not an officer with any revenue experience, nor had he before him at the time of his decision the clear pronouncement of their Lordships of the Privy Council to which reference has already been made. It is, therefore no imputation against him to say that, in the very brief judgment pronounced by him, he has not shown much appreciation of the difficulties of the case. He has definitely held that the plaintiffs were not entitled to possession as mortgagees over the land in suit; but he has enforced in their favour the penalty clause in the original contract of mortgage which they were most certainly not entitled to have the benefit of. The decree as passed is for recovery of the principal of Rs. 8,000, with arrears of interest and costs, by sale of the 63 bighas odd of land already referred to. From the operation of this decree, however a certain share has been excluded, on the ground that one of the former proprietors was a minor and that his certificated guardian joined in this mortgage on his behalf without having duly obtained the sanction of the District Judge. We have a petition of cross-appeal before us challenging the decision of the trial Court on this point; but in view of the decision which we have arrived at on the main question it seems unnecessary for us to go into it. If the appeal of the defendants succeeds the cross-objection must obviously fail.

Now, as regards the appeal of the defendants I have already given abundant reasons why in my opinion the decree as passed cannot stand. In the very able and ingenious argument addressed to us by Mr. M. L. Agarwala on behalf of the respondents, although he very properly declined to give up any part of his clients' case it is doing him no injustice to say that he could not make out much of a case for affirming the decree of the Court below as it stands. What he really pressed upon us was the right of his clients to one or other

of two different reliefs. He contended that in any event, his clients should be given the benefit of what I have called the hypothecation clause in the mortgage-deed of 19th June, 1913, and the proprietary rights of the mortgagors in the 30 bighas of land in question be brought to sale, at least in satisfaction of the principal of the mortgage debt. In reply to the suggestion that the right to enforce this hypothecation clause had not passed to his clients under the pre-emption decree, Mr. Agarwala contended with much keenness that no plea to this effect had been taken in the written statement of any of the defendants. It seems a fair rejoinder to this to say that neither was any claim to this effect set up in the plaint. The claim in the plaint was for cultivating possession over the land in suit, by ejectment of Mir Dad Khan and his fellow mortgagors, or in the alternative for enforcement of the penalty clause by the passing of a decree for sale in respect of the entire area of 63 bighas odd. I feel quite satisfied that, whatever might have been the rights of Thakur Das and others in respect of the hypothecation of the area of 30 bighas, those rights did not pass to the present plaintiffs under the pre-emption decree and that therefore this relief is not open to them.

The other contention pressed upon us by Mr. Agarwala has caused me more difficulty. It is based not merely on the documentary evidence already referred to, but upon certain evidence as to transactions which followed the execution of the mortgage deed in suit. Broadly speaking, Mr. Agarwala's contention is this:—That the mortgagors, Mir Dad Khan and others, whatever may or may not have been their rights under the deed in suit, did carry out their part of the contract by actually surrendering to the mortgagees, Thakur Das and others, the ex-proprietary tenancy which the Statute created in their favour. The argument is that the original mortgagees thus obtained actual cultivating possession of the land in question and enjoyed the same for the period of about a year; that by this possession the ex-proprietary tenure became finally extinguished and can no longer be set up against the plaintiffs, pre-emptors. I admit the contention to be a highly ingenious one and the question which it raises seems to me of

some difficulty. In the first place however I think that on the evidence on this record Mr. Agarwalla is asking too much of us in the way of findings of fact in his favour. The Patwari of the village was not put into the witness box nor any of the original mortgagees called. We know from the plaint that Mir Dad Khan and the other mortgagors were in actual cultivating possession of the 30 bighas of land when the suit was instituted on 5th July 1915, and the plaint certainly does not explain how or when they recovered that possession, if they did in fact surrender their ex-proprietary tenancy into the hands of the original mortgagees.

One of the plaintiffs went into the witness box and deposed that the mortgagees, Thakur Das and others, had entered into actual possession of the land. He said he himself failed to get actual possession because Mir Dad Khan forcibly cultivated it. He was cross-examined on this point in a manner which clearly showed that the defendants did not admit the facts stated by him to be correct, but the only evidence by which he sought to support himself was the production of certain records of the Revenue Courts showing the mutation proceedings which followed the execution of the mortgage deed in suit. Now the execution of that deed required in any event to be taken due notice of in the village records. There had to be some mutation of names in respect of it and the natural tendency of the Revenue Courts, unless their attention was specially called to the matter, would be to effect formal mutation of names in accordance with the terms of the deed. What I notice more particularly is that the Tahsildar, on whom the duty of making the necessary preliminary inquiries lay, when reporting the matter for the orders of the Assistant Collector in charge of the Sub-Division, contented himself with mentioning that there had been a surrender of the ex-proprietary holding, keeping back the very important fact which he should certainly have mentioned, that that surrender purported to have been made and attested by a deed of even date with the usufructuary mortgage itself, that is to say, at a time when it was at least doubtful whether the mortgagees were entitled to receive any such surrender, and under circumstances strongly suggestive on the face of them of an attempt to evade the law.

The Assistant Collector appears to have passed his order for mutation of names, without further consideration or inquiry, on the strength of the tahsildar's report. I am not satisfied therefore that this evidence proves that there was an effective surrender of the land in suit into the hands of Thakur Das, much less that the possession of Thakur Das and his fellow mortgagees lasted for the entire period of one year, or for anything like that period. It is of course possible that as between the original mortgagees and the original mortgagors, the contract would have been carried out according to its terms, if the plaintiffs had not interfered with their suit for pre-emption. The fact remains that, by the time when the present plaintiffs tried to obtain the benefit of their pre-emption decree, they found the original mortgagors in effect in possession of the land in suit and claimien to be exactly what the law says they are namely ex-proprietary tenants of the same. Looking at the matter in its broadest aspect, I would say that the rights which these plaintiffs took under their pre-emption decree in respect of the mortgage deed in suit, regarded as a usufructuary mortgage, were simply the right which the law would permit the original mortgagees themselves to take under the same namely the right to proprietary possession subject to an ex-proprietary tenancy in favour of the original mortgagors. This is the position taken up by the defendants in this suit, and I think that position is correct in law and that the plaintiffs are not entitled, either to the relief which has been decreed to them by the Court below, or to any of the reliefs which have been claimed on their behalf in the alternative. In this view of the case I would allow the appeal, set aside the decision of the Court below and dismiss the plaintiffs' suit with costs, including fees on the higher scale, and similarly dismiss with costs the cross objection filed by the plaintiffs respondents.

Walsh, J.—I agree. I think this is a colourable transaction. The two deeds were in fact an attempted sale of the ex-proprietary rights. If so the case is clearly covered by the decision of my learned brothers Tudball and Piggot, JJ., in *Dipan Rai v. Ram Khelawan Rai* (2) and also by the observations of the Privy Council reported as *Moti Chand v. Ikram Ullah* (1), where Sir John Edgein deliver-

ing judgment affirmed the principle laid down by the High Court that the transaction was not a lawful one, whether it was regarded as an attempted sale of the exproprietary rights or an agreement to relinquish those rights when they should arise, and he pointed out that the policy of Act No. 2 of 1901 was that the right of occupancy should be secured and preserved to the proprietor who becomes by a transfer the ex-proprietor, whether he wishes it to be secured and preserved to him or not and notwithstanding any agreement to the contrary between himself and the transferee. The transactions in these two deeds are in substance one transaction which took place on the same day—they are in form inseparable, but I think that the same principle would apply even if they were in form separable. I apply the same reasoning which was applied by the House of Lords in the case of *Maas v. Pepper* (5), the law being in England that no mortgage of moveable chattels could be entered into where the chattels remained in the possession of the grantor without a registered document. There had been a sale of furniture to an alleged purchaser who by a contemporaneous document re-let them on a hire agreement for the original price at which he had bought them plus an addition to that sum which the Court regarded as merely interest under another name, the agreement giving to the hirer the right to become the owner by re purchase if he paid the instalments under the agreement.

Now those two documents were entirely independent in form. No netheless the House of Lords held that the trial Court had been right in going behind the form and deciding what was in substance the real transaction, and pointed out that the sale was really a colourable sale to disguise what was in substance a loan. I think by the same reasoning this was a colourable relinquishment to disguise what was in fact a sale. No doubt an ex-proprietary tenant can as such surrender his rights by proper relinquishment. Nobody can put the point I think better than it has been put by Mr. M. L. Agarwalla at p. 69 of his book on the Tenancy Act in this sentence:

"It comes to this that though a proprietor can in fact give up his ex-proprietary rights when they accrue by not availing himself of them he cannot bind himself by an express stipulation to

that effect in a deed of transfer of the property or the like."

I think that is what these documents purported to do. I agree with what my brother has said about the decision in *Lekhraj v. Parshadi* (3). Unless the facts of that case are distinguishable from this case by something which does not appear in the judgment, I am bound to say having regard to the facts reported, that the two transactions in that case being contemporaneous in date, I should have found difficulty in holding that the alleged relinquishment in that case was not also a colourable transaction. To that extent I am unable to agree with the decision.

By the Court.—We allow the appeal set aside the decision of the Court below and dismiss the plaintiffs' suit with costs, including fees on the higher scale. We also dismiss with costs the cross-objection filed by the plaintiffs-respondents.

V.B./R.K.

Appeal allowed.

A. I. R. 1918 Allahabad 92

TUDEBALL AND ABDUL RAOOF, JJ.

Tamizunnissa Bibi and another—Appellants.

v.

Najju and another—Respondents.

Execution Second Appeal No. 459 of 1917, Decided on 26th June 1918, from a decree of Dist. Judge, Badaun.

Limitation Act (1908), Art. 182 (5)—Application to reject objections against execution is step-in-aid.

An application to a Court executing a decree to reject certain objections filed against the execution of the decree, so as to enable the execution to proceed, is an application made to the proper Court to take a step-in-aid of execution.

[P 92 C 2]

Iqbal Ahmad—for Appellants.

Ibn Ahmad—for Respondents.

Judgment.—This is a judgment debtor's appeal and the sole question is whether the decree-holders' application of 18th July 1913 is an application made to a proper Court to take a step-in-aid of execution. That application was an application to the Court to reject certain objections which had been filed against the execution of the decree, so as to enable the execution to proceed. It was, in our opinion, an application made to the proper Court, and it was an application asking that Court to take a step which was very necessary for the execution of the decree. The appeal fails and is dismissed with costs.

V.B./R.K.

Appeal dismissed.

A. I. R. 1918 Allahabad 93

KNOX, J.

Jaguji Rai and another—Applicants.

v.

Emperor—Opposite Party.

Criminal Revn. No. 154 of 1918, Decided on 9th May 1918, from order of Magistrate, First Class, Azamgarh.

Criminal P. C. (1898), Ss. 107 and 112—S. 112 is to be read with S. 107—First Class Magistrate getting information that person is likely to disturb public tranquillity—Information not giving any wrongful acts—Magistrate considering information reliable—He has jurisdiction to make order under S. 112.

S. 112 should be read along with S. 107 of the Code. [P 93 C 2]

Where a Magistrate of the first class is informed that a person is likely to disturb the public tranquillity without any information being given as to his intent to do wrongful acts and the Magistrate considers the information to have come from a reliable source, he has jurisdiction to make an order under S. 112. In such a case it is not necessary to specify in the order any definite acts which the person intends to commit. [P 93 C 2]

*W. Wallach—for Applicants.**R. Malcomson—for the Crown.*

Judgment.—Jaguji Rai and Inderjit Rai have been bound over to keep the peace for a year. They are to furnish each of them a reliable surety for Rs. 100 and to execute a personal bond in the same amount for this purpose. They were bound over by a Magistrate of the first class of Azamgarh. They do not appear to have gone to the District Magistrate and asked him to cancel this bond, as they might have done under S. 125, Criminal P. C. When a person bound over to keep the peace does not adopt this procedure, I always have considerable doubt as to his general reputation in the district, and it is open to the applicants at any time hereafter to satisfy the District Magistrate that there is no necessity any longer for this bond being kept in existence. They have come to this Court with the contention (1) that the evidence on the record does not justify an order under S. 107, Criminal P. C., (2) that if they had committed a substantive offence as alleged by some of the witnesses for the prosecution, the proper procedure against them would be to proceed against them for the said offences and not to proceed under S. 107, Criminal P. C. The learned counsel for the applicants took exception to the notice which had been issued to them under

S. 112 of the Code. Now S. 112 has to be read along with S. 107. S. 107 lays down that whenever a Magistrate of the first class is informed that any person is likely to commit a breach of the peace or to disturb the public tranquillity, or to do any wrongful act which may occasion a breach of the peace, or disturb the public tranquillity, he may require that person to show cause why he should not be ordered to execute a bond. As I read this section, there may be cases in which a Magistrate of the first class is merely informed that a person is likely to disturb the public tranquillity without any information being given as to his intent to do wrongful acts.

The Magistrate is responsible for the peace of the district. He acts upon this information and he is required to set forth in writing the substance of the information received. In this case we are not told that the Magistrate has received any information of definite acts intended. Apparently from the information he received he was satisfied that the persons concerning whom the information had been given were likely to commit some act which might occasion a breach of the peace. The reason given for this probability was that they were on terms of enmity with each other. Where the Magistrate can go into further particulars he should certainly go into them. But it may well be that all the information he receives is that there will be a breach of the public peace, and if he considers that information to come from a reliable source, he has jurisdiction to make the order required by S. 112. Anyhow in the present case the matter has gone far beyond the stage of the order under S. 112. Certain information was given. The order calling upon the applicants to show cause was duly communicated to them. They questioned the reliability of the information. Evidence was offered and recorded at considerable length. Some of it is hearsay evidence. Some of it is evidence of actual acts, not of a peaceful nature, committed in the past. Some of it is words or expressions which, if true, point to the fact that a breach of the peace would be a probable result unless some strong hand was put upon the persons in question. The evidence of the two chaukidars, Sheoraj Ahir and Chiraghan, was read to me at full length, and I have glanced at the

other evidence given in the case. A perusal of that evidence certainly leaves an impression upon my mind that an idea prevailed in Deohatta that a breach of the peace would take place.

I have also glanced through the evidence given to rebut the evidence for the prosecution. It is of a very vague description and some of the witnesses in cross-examination had to admit that they very seldom came to Deohatta, and one who said that no quarrel had taken place had also to confess that he had not been in the village for the last two years. It is not said that the terms are too severe. I see no reason for interfering and dismiss the application.

V B./R.K. *Application dismissed.*

A. I. R. 1918 Allahabad 94

RICHARDS, C. J. AND BANERJI, J.

Prem Sukh Das and another—Appellants.

v.

Lachmi Tewari—Respondent.

First Appeal No. 120 of 1917, Decided on 7th March 1918, from order of Dist. Judge, Ghazipur, D/- 31st July 1917.

(a) Guardians and Wards Act (8 of 1890), S. 31—Sale of minor's property with sanction of Court—Re-sale cannot be ordered—Duty of District Judge laid down.

Where an unconditional sanction has been given by a District Judge to the sale of a property of a minor by the guardian appointed by the Court, he has no jurisdiction to order a re-sale of the property after the sale has been executed and registered.

It is the duty of District Judges to look after the interests of minors and to see that guardians do their duty and file proper accounts and when guardians are appointed they should be called upon to furnish security. [P 95 C 1]

(b) Guardians and Wards Act (1890), S. 47—Appeal—*Quære*.

Quære—Whether an appeal lies from an order of a District Judge ordering the re-sale of a property of a minor which has already been sold under his order. [P 95 C 1]

Wallach and Janaki Prasada—for Appellants.

Lakshmi Narayan Tewari—for Respondents.

Judgment.—The facts of this case are somewhat unusual. Under the Guardians and Wards Act the District Judge has power to sanction the sale by the certificated guardian of whole or portion of the minor's property. The minor's guardian made an application in which he stated that the minor's property consisted of a number of houses in very bad

repair, that if one house was sold the other houses might be repaired and become of value. The value of the house to be sold was stated as Rs. 400. The learned District Judge directed the Munsif to enquire what was the value of the house. The Munsif reported that the value of the house was Rs. 400 and the appellant here, who was the proposed purchaser, was willing to give this sum. The District Judge sanctioned the sale at Rs. 400 and the draft deed of sale was prepared. Before however it was executed one Hanuman Prasad informed the Court that he was willing to give Rupees 1,000 for the house. Thereupon the District Judge passed an order that the appellant might have the house if he was prepared to pay the thousand instead of Rs. 400 but otherwise it would be sold to Hanuman Prasad. This order was passed upon the application of the guardian. The appellant thereupon appears to have waived all rights which he might have had under the original order sanctioning the sale at Rs. 400 and agreed to pay the Rs. 1,000. The deed of transfer was duly executed and registered. His rival then came in with a fresh offer of Rs. 1,400 whereupon the District Judge directed the property to be sold by auction. The appellant complains of this order. Mr. Lakshmi Narain on behalf of the guardian raises the preliminary objection that no appeal lies.

If this house was really worth Rupees 1,400 or even Rs. 1,000 the report of the Munsif reflects very little credit on him, when the District Judge sent for a report from him as to the value of the minor's property he ought to have taken very good care that he had proper independent evidence as to what was the real value of the property bearing in mind that it is the duty of the Court to look carefully after the interests of minors. The fact that after the sale at Rs. 400 was sanctioned an offer was made for Rs. 1,000 certainly suggests that Rs. 400 was an under-value. It is possible however that there may have been some unexplained or ulterior motive which induced this Hanuman to make the offer of Rs. 1,000 subsequently increased to Rs. 1,400. It has been said (we do not know with what accuracy) that the house used to be let at Rs. 2 a month. We may now disregard altogether the first order sanctioning the sale at Rs. 400. The sale was not carried out

at that price but it is quite clear that there was a sanction by the District Judge to the guardian to sell the house to the appellant for Rs. 1,000. This order was never set aside and the order directing a sale by auction was made after execution of the sale and its registration. Nowhere in the judgment of the District Judge does he find that the appellant has been guilty of fraud. It seems to us that after an unconditional sanction had been given to the sale at Rs. 1,000 and after the sale had been executed and registered, the learned District Judge had no jurisdiction to order a re-sale of the property. Under these circumstances, and assuming that no appeal lies, we can treat the present appeal as an application in revision and we propose to do so. We could call the attention of the learned District Judge to the conduct of the guardian. Of course, if the property was only valued at or about Rs. 400 and Hanuman's offer were not based on the real value of the property, no blame can be attached to the guardian.

But if he made an application to the Court to sanction the sale for Rs. 400 of property which was worth Rs. 1,000 or Rs. 1,400, he was guilty of gross neglect of duty. If he knows that Rs. 400 was far below the value of the property he was guilty of fraudulent conduct. As guardian of the minor it was his duty to ascertain what was the real value of the property and to inform the Court of its real value when he made the application for sanction to sell. We have had in numerous cases to point out to District Judges that it is their duty to look after the interests of minors and to see that guardians do their duty and file proper accounts, and that when guardians are appointed they are in the majority of cases at least called upon to furnish security. The order of the Court is that the order of the District Judge directing a sale of the property by auction be set aside. We make no order as to costs. The District Judge should consider as to whether the guardian under the circumstances of the present case ought to be allowed his costs out of the minor's property.

V.B./R.K. -

Order set aside.

A. I. R. 1918 Allahabad 95

RICHARDS, C. J.

Mahabir and others—Applicants.

v.

Emperor—Opposite Party.

Criminal Revn. No. 3 of 1918, Decided on 27th February 1918, from order of Dist. Magte. Basti.

Criminal P. C. (1898), S. 107—Conviction under S. 147, Penal Code—District Magistrate in appeal cannot order accused to give security for good behaviour—Order directing particular person to be surety is also invalid.

A District Magistrate has no jurisdiction in an appeal from a conviction under S. 147, Penal Code, to order an accused person to give security to be of good behaviour although he may order security to keep the peace, nor is his order directing a particular individual to be one of the sureties a valid order. [P 95 C 2]

*Satya Chandra Mukerji—*for Appellants.

*R. Malcomson—*for the Crown.

Judgment.—The applicants were charged under S. 147 of riot and convicted by a Magistrate of the Second Class on 31st October 1917. The accused appealed and on the matter coming up before the District Magistrate of Basti, on 5th November 1917, he confirmed the order of the Court below, but in addition to that he ordered the accused to furnish security to be of good behaviour and that one of the sureties must be a certain lady. Apparently the District Magistrate thought that the riot had been either instigated by or had been made on behalf of the lady and that therefore she would be a very good person to give security. The order directed that the security should be for good behaviour. This was clearly a mistake, because the District Magistrate would have no jurisdiction in appeal from conviction to order an accused person to give security to be of good behaviour, although he might no doubt order security to "keep the peace." It is admitted on both sides that this error must be corrected. A further objection is taken to the order that the District Magistrate had no jurisdiction to direct that one of the sureties must be a particular individual. The Assistant Government Advocate admits that he cannot support this order, and I am also of opinion that the order directing that a particular person must be one of the sureties is not a valid order. I accordingly vary the order of the learned District Magistrate in this way. The applicants will

themselves execute bonds in the sums of Rs. 200 with two sureties in like sums to keep the peace for one year in each man's case, from the date of the expiration of one month's rigorous imprisonment imposed for the offence. In default I direct simple imprisonment for the remainder of the year.

V.B./R.K. *Order modified.*

A. I. R. 1918 Allahabad 96

BANERJI AND RYVES, JJ.

Nur Uddin Khan—Judgment-Debtor—Appellant.

v.

Pran Kishan Chakaravarty and another—Decree-holders—Respondents.

Execution First Appeal No. 11 of 1918, Decided on 7th June 1918, from a decree of Dist. Judge, Cawnpore.

(a) Civil P. C. (1908), O. 43, R. 1 (a)—Order returning memo of appeal for presentation to proper Court is not appealable.

A memorandum of appeal is not a plaint.

No appeal lies against an order of an Appellate Court directing a memorandum of appeal to be returned for presentation to the proper Court.

[P 96 C 2]

(b) Execution—Decree binding.

A Court executing a decree is bound to give effect to it as it stands.

[P 96 C 2]

S. M. Sulaiman—for Appellant.

Peary Lal Banerji—for Respondents.

Judgment.—This appeal has been preferred under the following circumstance. A suit was brought by the appellant for dissolution of partnership and for the taking of partnership accounts. The matter was referred to arbitration, and an award was made which was accepted by the Court and in accordance with which a decree was passed. Under the award the defendants were found entitled to Rs. 6,000 odd from the plaintiff, and the award directed that they should realize the said amount by sale of the partnership assets. The defendants, who are respondents here, made an application to the Court for execution of the decree which, we may mention, has become final. The application was resisted on the ground that under the terms of the decree the applicants for execution were not entitled to take out execution. This objection was overruled by the Court of first instance and the appellant subsequently paid the amount of the decree and under the terms of the award he obtained possession of the property, namely, partnership buildings and stock-in-trade, etc. The plaintiff pre-

ferred an appeal to the District Judge. The District Judge held that the decree was capable of execution but he was of opinion that no appeal lay to him, and he directed the memorandum of appeal to be returned to the appellant for presentation to the proper Court. In his opinion the value of the suit exceeded Rs. 5,000. From this order returning the memorandum of appeal the present appeal was preferred. In the alternative it was prayed that the application might be treated as one for revision if no appeal lay.

In our opinion no appeal could be preferred to this Court from the order directing the memorandum of appeal to be returned for presentation to the proper Court. Under O. 43, R. 1 an appeal lies from an order returning a "plaint," but a "memorandum of appeal" is not a "plaint" and therefore that order has no application to the present case. It may be an omission on the part of the legislature, but under the law as it stands we are unable to hold that the word "plaint" includes "the memorandum of appeal." This Court in the case of *Nazar Hasain v. Kesri Mal* (1) held that no appeal lay from an order returning a memorandum of appeal. We see no reason to differ from the view taken in that case. We accordingly hold that this appeal as an appeal is not maintainable. Looking at the case as an application for revision we are of opinion that there are no merits in it, inasmuch as the decree made by the Court awards to the defendants the amount which they sought to recover by execution and which has been paid to them by the applicant. Whether that decree is a right decree or a wrong decree it is now too late to consider. A Court executing a decree is bound to give effect to it as it stands, and the decree in this case does award the amount claimed to the defendants. Therefore the case is without merit and we see no reason to exercise our discretionary powers under the revisional section. We accordingly dismiss the appeal, and decline to take action in revision. The respondents will get their costs.

Appeal dismissed.

1. (1890) 12 All 581.

A. I. R. 1918 Allahabad 97 (1)

RICHARDS, C. J. AND BANERJI, J.

Mohamad Iltifat Husain—Decreeholder-Appellant.

v.

Alim-un nissa and others—Judgment-debtors-Respondents.

Execution Second Appeal No. 296 of 1917, Decided on 10th April 1918.

Civil P. C. (1908), O. 34, R. 6—Order refusing to make decree under O. 34, R. 6 is decree—Appeal must bear ad-valorem Court-fees—Court-fees Act (1870), Sch. I, Art. 1.

An order refusing to make a decree under O. 34, R. 6, is a decree within the meaning of the definition of that term in S. 2 of the Code, and an appeal against it must bear ad valorem Court-fees, calculated upon the value of the subject-matter of the appeal. [P 97 C 1]

Order.—A report has been submitted by the office that the appellant was liable for additional court-fees in the lower appellate Court calculated upon the value of the subject-matter of the appeal. The application was for a decree under O. 34, R. 6, made in the original mortgage suit. The application, of course, could be made on an 8-anna stamp, but the question is what should the fee be which either side would have to pay if they were dissatisfied with the ruling of the Court to which the application was made. In the present case the Court made an order dismissing the application for a decree under O. 34, R. 6. In the case of *Tajammal Husain Khan v. Muhammad Husain Khan* (1) Tudball, J., held that the defendant against whom a decree under O. 34, R. 6, had been made was obliged to pay an ad valorem court-fee on the decree which had been made against him. The learned Judge was of opinion that the decision appealed against was clearly a "decree" within the meaning of the Code of Civil Procedure. We think that the view taken by Tudball J., was correct. The only difference between that case and the present is that the Court of first instance, instead of granting a decree under O. 34, R. 6, refused to make such decree. We think that an order refusing to make a decree under O. 34, R. 6, must be regarded as a "decree" within the meaning of the definition of that term in the Code of Civil Procedure. We think that the report of the office as to the liability of the appellant for payment

1. (1916) 35 I O 158,

1918 A/13 & 14

of ad valorem court-fees in the first appeal was correct and that the amount must be paid by the appellant.

V.B /R.K.

Order accordingly.

A. I. R. 1918 Allahabad 97 (2)

RICHARDS, C. J. AND BANERJI, J.

Sukha—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 776 of 1917, Decided on 2nd January 1918, from an order of Sess. Judge, Agra, D/- 12th September 1917.

Penal Code (45 of 1860), Ss. 111, 114 and 302—Conspiracy to obtain girl by show of force—On refusal one accused shooting—Death caused—Others are not guilty of abetment as causing death was no part of conspiracy.

H and *S*, in pursuance of a conspiracy to obtain a certain girl by show of force, went to her mother's house and asked her to give up the girl. The mother refused to do so, and *H* thereupon fired a gun loaded with kankar at her. The mother died from the wounds inflicted by the shot:

Held: that *S* was not guilty of abetting the death of the mother inasmuch as the death was not a probable consequence of the conspiracy, and was not caused under the influence of the instigation or with the aid or in pursuance of the conspiracy which constituted the abetment.

[P 98 C 2]

R. Malcomson—for the Crown.

Judgment.—*Sukha* has been convicted under S. 302 read with Ss 111 and 114, I. P. C. It appears that one Hindwa had had an intrigue with a Berni girl of the name of Patva. A neighbouring Thakur seems to have taken a fancy to the same girl. Hindwa and *Sukha* were found travelling with the girl when another Thakur got hold of Hindwa and *Sukha*, locked them up and sent the girl and her mother away. *Sukha* and Hindwa were then released and later on arrived at the mother's house and asked for the girl. The mother said that she would fetch her. She apparently had no real intention of giving up the girl, and instead of producing her she brought the chowkidar. Hindwa again demanded the girl. The woman said that if he laid aside the gun that he was carrying she would fetch her. It appears that Hindwa had a gun and *Sukha* had a sword. Eventually when the girl was not given up, Hindwa fired at the mother. It appears from the medical evidence that Hindwa must have been standing very close to the woman because marks of gun powder were actually on her

face. The gun was not loaded with shot, it was loaded according to medical evidence, with small piece of kanker. All the wounds it inflicted except three were of a simple nature. Three only were grievous. The woman lived for about a month and eventually died of gangrene in the lungs caused by one or more of the three serious wounds. From the nature of the wounds and the close proximity at which Hindwa must have stood, it would rather seem that there was no intention on the part of Hindwa to kill the woman. Had the gun been loaded in the ordinary way it would undoubtedly have killed the woman on the spot. The only evidence in the case which shows that Sukha made any show of violence has been disbelieved by the learned Judge, for reasons which he has given.

We do not know what has become of Hindwa. Probably he is absconding. Undoubtedly Hindwa was the person who fired the shot. The question is whether or not Sukha is guilty, having regard to the provisions of S. 111, I. P. C. That section provides that when an act is abetted and a different act is done the abettor is liable for the act done in the same manner and to the same extent as if he had directly abetted it, provided the act done was a probable consequence of the abetment and was committed under the influence of the instigation or with the aid or in pursuance of the conspiracy which constituted the abetment. The conspiracy in this case was undoubtedly only a conspiracy to get hold of the dancing girl. It is not quite clear whether the gun and the sword were intended to frighten the mother into giving up the girl or as a demonstration against the Thakurs. There certainly does not appear to have been a conspiracy to murder any one. The next that can be said is that there was a conspiracy to obtain possession of the girl with a show of force. Having regard to the peculiar and special facts of this case we find some difficulty in holding that the homicide of Mt. Radhia was a probable consequence of the conspiracy and that it was committed under the influence of the instigation or with the aid or in pursuance of the conspiracy which constituted the abetment. The accused is of course, entitled to any reasonable doubt which we may have in the matter. We allow the appeal set aside the conviction and sentence and acquit

the accused of the offence with which he is charged and direct his release.

V.S./R.K.

Appeal allowed.

A. I. R. 1918 Allahabad 98

RICHARDS, C. J. AND BANERJI, J.

Sajjadi Begam—Plaintiff—Applicant.
v.

Dilawar Husain and others—Defendants—Opposite Parties.

Civil Revn. No. 186 of 1917, Decided on 25th April 1918, from order of Addl. Sub-Judge, Moradabad.

Civil P. C. (1908), S. 152—Certain terms embodied in decree—Court passing cannot alter it except on application for review of judgment.

Once certain terms are embodied in a decree the Court itself which passed the decree, even if it so desires, has no jurisdiction to alter it save on an application for review of judgment.

[P 99 C 1]

Where therefore a Court made a decree in plaintiff's favour conditional upon his paying an extra court-fee within a certain time and directed that the suit would stand dismissed in the case of non-compliance with the condition:

Held: that the Court had no jurisdiction to interfere with the decree by extending the time for payment of the extra court-fee. [P 99 C 1]

Iqbal Ahmad for Muhammad Yusuf—for Applicant.

S. A. Haidar—for Opposite Parties.

Judgment.—The facts connected with this and the connected application are shortly as follows: A suit was brought by the plaintiff for dower and also to set aside certain deeds executed by her deceased husband. A question as to the sufficiency of court-fees arose, and eventually the Court made a decree in the plaintiff's favour conditional upon her paying an extra court fee of Rs. 20 within a week. If this extra court-fee was not paid the suit was to stand dismissed. What we have just now stated was all embodied in and was part of the decree itself. Unfortunately (it is said through the negligence of the plaintiff's pleader) she did not get proper information with the result that she deposited Rs. 10 only within the time allowed. The defendants then made an application for execution of the decree on the ground that the decree was now in their favour, the deposit of Rs. 20 not having been made as provided in the decree. The plaintiff sought in vain to be allowed to pay in the extra Rs. 10. The Court doubted that it had jurisdiction to extend time and rejected the application for extension of time. The plaintiff comes here in

revision and contends that the Court had jurisdiction and it ought to have exercised it. This Court always feels great difficulty in interfering with the discretion of the Courts below on matters of discretion. But there seems to be a more formidable objection to the present application, namely that once the term about depositing the Rs. 20 was embodied in the decree the Court itself, even if it desired, had no jurisdiction to alter its own decree save on an application for review of judgment under S. 114 read with O. 47, R. 1. The case of *Naik Ram v. Bhagwan Chand* (1) is cited. This was a decision of a single Judge and the judgment consists of a single line. The circumstances were no doubt in principle the same as in the present case. The judgment of the Court is: "The Court had undoubtedly jurisdiction to extend the time." It has been over and over held in pre-emption suits where the decree itself provides that the pre-emptor is to have possession conditional upon his paying the pre-emption money into Court within a specified time and that upon his failure to do so the suit shall stand dismissed, that the Court has no jurisdiction to extend the time. The ground for these decisions has always been that the Court has no jurisdiction to interfere with its own decree save in the manner we have mentioned above. There is no distinction between a pre-emption decree and any other decree which embodies certain conditions and provides for the suit being dismissed if those conditions are not complied with. The only exception is that of a mortgage decree; time can be extended in mortgage decrees by virtue of the provisions of O. 34. We reject the application but under the circumstances we make no order as to costs.

We may here mention that we think that it would have been better had the Court, after determining that the extra fee was payable, ordered the fee to be paid within a certain time, and delayed passing its decree until that time had expired.

V.B./R.K. *Application rejected.*

1. (1917) 42 I O 618.

A. I. R. 1918 Allahabad 99

TUDBALL, J.

Kedar Nath—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 262 of 1918, Decided on 13th June 1918, from order of Sess. Judge, Agra.

(a) U. P. Prevention of Adulteration Act (1912), Ss. 4 and 12—Sanction under S. 12 subsequent to offence—Prosecution is not bad.

A complaint filed under S. 4, U. P. Prevention of Adulteration Act by an Executive Officer of a Municipal Board duly authorised under S. 12 of the Act to institute proceedings under the Act is not illegal merely because on the date on which samples were taken, the officer had not been so authorised. [P 100 C 1]

(b) U. P. Prevention of Adulteration Act (1912), S. 6—S. 6 does not apply to commission agents.

Section 6 (a) does not apply to a commission agent who has not purchased the adulterated article and who does not sell it but merely exposes it for sale. [P 100 C 1]

S. K. Dar—for Applicant.

R. Malcomson—for the Crown.

Judgment.—The applicant has been convicted under S. 4 Act 6, of 1912, which is a Local Act of the United Provinces Legislative Council. He has been sentenced to a fine of Rs. 80. The facts of the case are not in dispute. The applicant is a commission agent and as such he exposed for sale what purported to be ghee. The ghee no doubt belonged to those persons who had sent it to him for sale. But it was he who exposed it for sale, and he exposed it as being good and genuine ghee. The Chief Sanitary Inspector of the Agra Municipal Board went to his warehouse where he saw certain cannisters of ghee open and exposed for sale. There were a large number of other cannisters unopened. With the consent of Kedar Nath he took several samples of ghee, gave one to Kedar Nath, kept one himself and sent one to the public analyst. The certificates of the latter person show clearly that the ghee had been adulterated. The complaint in the present prosecution was signed by the Executive Officer of the Municipal Board on 8th October 1917. This Officer on 20th September 1917 was authorised by the Municipal Board to institute prosecutions under the Act. The samples obtained from the applicant were obtained on 12th September. Three points have been taken before me, one is that the prosecution is illegal in the present instance as it has not been made with the order or consent

in writing of the proper person and also that on 12th September the Executive Officer had no power to institute the prosecution. The second point is that S. 6 applies to the case and exonerates the applicant. The third point is that the applicant has acted in good faith. He sold what he had received from others and a smaller fine would be sufficient to meet the ends of justice. As regards the first point, there is no force in it. On the date on which the complaint was made the Executive Officer had full power and the Court was, therefore, fully justified in acting upon the complaint. As regards S. 6 it clearly does not apply to the present applicant. Admittedly Cl. (a) of that section could not possibly apply to him as he is only a commission agent and had never purchased the ghee in question.

Moreover, in the present case he has made no sale at all but he had only exposed for sale. The act may be defective but that is not the fault of any body else but the legislative body. S. 6 clearly does not apply to the present case. So far as the sentence is concerned there can be very little doubt that the applicant as well as every body else concerned knew that the ghee was adulterated. The act was passed for the public welfare and it is only by a thorough working of it that the public will benefit from it. These persons who sell ghee are generally well aware of the fact that it is adulterated. I, therefore, see no reason to interfere with the sentence. The application is accordingly dismissed.

V.B./R.K. *Application dismissed.*

A. I. R. 1918 Allahabad 100 (1)

BANERJI, J.

Chaitan Lal—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 249 of 1918, Decided on 8th June 1918, against order of Dist. Magistrate, Muzaffarnagar, D/- 9th April 1918.

Criminal P. C. (1898), S. 435—Complaint of theft against brother compromised—Action taken under S. 182, I. P. C., is not proper—Penal Code (1860), S. 182.

Where a complaint of theft brought by a person against his brother was compromised and thereafter the complainant was prosecuted under S. 182.

Held: quashing the proceedings under S. 435, that this was not a case in which any action ought to have been taken or any proceedings instituted. [P 100 C 2]

P. L. Banerji—for Applicant.

R. Malcomson—for the Crown.

Judgment.—Two brothers Kishen Murari and Chaitan Lal lived in the same house but occupied different quarters. During the absence of Chaitan Lal, Kishen Murari is said to have broken open the door of the room occupied by Chaitan Lal. Chaitan Lal made a report to the police charging his brother with theft. He also filed a complaint before a Magistrate. The matter was subsequently compromised and the case brought in the criminal Court was dismissed. After all this on the application of the Police of the Superintendent of Police sanctioned the prosecution of Chaitan Lal for bringing a false charge under S. 182, I. P. C., and he is being prosecuted under that section. Arguments have been addressed to me on the question whether the case comes within the purview of S. 182 or S. 211. I do not deem it necessary to decide the question of law just raised, because in my opinion this is not a case in which any action ought to have been taken and any proceedings instituted. The dispute was one between two brothers. The offence with which Kishen Murari was charged might or might not be theft but no advantage would be gained by continuing the proceedings which have been instituted under S. 182. I accordingly quash those proceedings and direct that they be discontinued. I make this order in exercise of the powers vested in this Court under S. 435, Criminal P. C., as held in *Jai Narain Lal v. Emperor* (1).

V.B./R.K. *Proceedings quashed.*

1. (1918) 46 I. C. 407.

A. I. R. 1918 Allahabad 100 (2)

BANERJI, J.

Raghunath and others—Accused—Applicants.

v.

Emperor—Opposite Party.

Criminal Revn. No. 236 of 1918, Decided on 23rd May 1918, from order of First Class Magistrate, Meerut.

(a) Public Gambling Act (as amended by Act (1 of 1917), Ss. 3 and 4—Keeping common gambling house—Prosecution must prove that instruments of gambling were used in the house for profit of accused.

In order to sustain the conviction of an accused person for keeping a common gambling house it is necessary for the prosecution not only to prove that the accused owned the house, or was occupier of it, and that instruments of gamb-

ling were kept or used in it, but that they were kept or used for the profit of the accused. In the absence of evidence to show that profit or gain was actually made a conviction cannot be maintained upon mere suspicion. [P 101 C 2]

(b) Public Gambling Act (as amended by Act 1 of 1917), Ss. 3 and 4—Particular house is common gambling house not established—Presence of accused in house raises no presumption.

Where it is not established that a particular house is a common gambling house, the presence of the accused in that house can raise no presumption against them, and even if the house is a common gaming house, no presumption will arise against them unless it can be shown that gambling was going on at the time when they were present. [P 101 C 2]

Nihalchand—for Applicants.

R. Malcomson—for the Crown.

Judgment.—The applicants have been convicted under the Gambling Act 3 of 1867, as amended by Act 1 of 1917. Raghunath has been convicted under S. 3 the others under S. 4 of the Act. The case against these persons was that they were carrying on wagering or betting on suttas relating to the sale of opium, Raghunath was charged with keeping a common gambling house. Under Act 1 of 1917, wagering or betting has been included in the definition of "game," and any article used as a means or appurtenance of or for the purpose of carrying on or facilitating gaming is included in the expression "instrument of gaming." What happened was this, The police raided the shop of Raghunath where he deals in cloth. They found the other accused (and some others) assembled there, sitting round a lighted lamp and some writing was being done by one of the persons assembled. The police seized a number of papers which were found in that room. They also found money in a box of Raghunath and loose silver pieces and money in the possession of the other accused. It was stated that the papers which were discovered were papers used for the purpose of betting and were, therefore instruments of gambling. What the papers really were it is difficult to say. They contained writings which were in cypher. One witness, namely, Kundan Lal (P. W. 6), attempted to explain what some of the papers meant. If his statement is correct the papers show that they related to betting. The paper which was being written at the time the police raided the house of Raghunath has not been produced or proved. I have considered the evidence and have heard the

arguments addressed to me on behalf of the accused and the Crown.

It is very difficult to say whether the papers found did in fact relate to wagering or betting. With the exception of one paper the others did not show that this betting, if any was going on after the passing of Act 1 of 1917, which made betting an offence under the head of gambling. Having regard however to the nature of the papers, it may be assumed that they related to gambling. In order however to sustain the conviction of Raghunath for keeping a common gambling house it was necessary for the prosecution to prove not only that he owned the house, or was the occupier of it, and that instruments of gambling were kept or used in it, but that they were kept or used for the profit or gain of Raghunath. There is not a particle of evidence to show that he made any profit or gain out of the transactions which might have taken place in his house. It is possible that he made some profit, but in the absence of evidence to show that profit or gain was made he could not be convicted merely upon suspicion. Therefore in my opinion his conviction for keeping a common gaming house as defined in Act 1 of 1917 cannot be sustained. As regards the other accused there is no evidence whatever that they were engaged in betting or wagering when the police raided the house.

As it has not been established that the house was a common gaming house, their presence in that house can raise no presumption against them and even if the house was a common gaming house, no presumption will arise against them unless it can be shown that gambling was going on at the time when they were present. As to this there is no evidence whatever. It is probable as I have said above, that gambling (that is betting or wagering) used to be carried on in Raghunath's house; but that alone would not justify his conviction or the conviction of the other accused, in the absence of evidence showing that his house was a common gaming house within the definition of that expression in the Act and that the other accused gambled in that house. Under these circumstances the conviction must be set aside. I allow the application, set aside the conviction of the accused and the sentence passed on them and direct that the fines

if paid, be refunded. I also direct that the moneys seized in the house be returned to the persons from whose possession they were seized.

V.B./R.K. *Application allowed.*

A I. R. 1918 Allahabad 102 (1)

RICHARDS, C. J.

Mahu and others—Applicants.

v.

Emperor—Opposite Party.

Criminal Revn. No. 78 of 1918, Decided on 27th February 1918, from order of Magistrate, 1st Class, Aligarh.

Criminal P. C. (1898), S. 107—Demand of security—Information given to Magistrate that accused intended to hold market on their land—No information given that they intended to commit breach of peace by wrongful act—Order under S. 107 is illegal

Accused, owners of a certain piece of land, intended to open a market upon it for the sale of cattle near a place where there already was an old cattle market. The Magistrate, apprehending that that circumstance would very likely cause a breach of the peace, made an order against the accused under S. 107.

Held: that as the Magistrate was only informed that the accused intended to hold a market on their land without being at the same time informed that they intended to commit a breach of the peace by doing any wrongful act, the order of the Magistrate was illegal. [P 102 C 2]

Satya Chandra Mukerji—for Applicants.

R. Malcomson—for the Crown.

Judgment.—In this case the Magistrate has made an order under S. 107 against the applicants. It appears there is a cattle market at a certain place not very far from land which is owned by the applicants. The Magistrate had reason to think that the applicants intended to open a market upon their land for the sale of cattle. He thought, and I agree with him, that this circumstance would very likely cause a breach of the peace. What would most likely happen was that the owners of the older market would raise objection to the new market and that the applicants as owners of the land upon which the new market would be held would resist the action of the owners of the older market. The section however provides that where the Magistrate is informed that any person is likely to commit a breach of the peace or disturb the public tranquillity or to do any wrongful act which may occasion a breach of the peace or disturb the public tranquillity the Magistrate may then make the order. It is not pretended that the Magistrate was informed that any

of the applicants intended to commit a breach of the peace. He was only informed that they intended to hold a market on their own land. If this act was wrongful act then the Magistrate would be entitled to act. But it is not contended that the act would be wrong. Under these circumstances I do not think that the order could legally be made. I accordingly allow the application and set aside the order of Magistrate.

V.B./R.K. *Application allowed.*

A. I. R. 1918 Allahabad 102 (2)

TUDBALL AND RAOOF, JJ.

Debi Prasad and another—Plaintiffs—Appellants.

v.

Badri Prashad—Defendant—Respondent.

Second appeal No. 712 of 1916, Decided on 13th March 1918, from decree of Addl. Judge, Farrukhabad.

Limitation Act (1908), S. 23—Suit for declaration—Each invasion of right to take fallen wood gives rise to fresh cause of action and suit for declaration can be brought within six years of each invasion.

The right to take wood falling from certain trees is one which can only be exercised on occasion, that is, when any wood may fall or be cut from the trees. It does not occur every year or at stated times. Each invasion of the right gives rise to a fresh cause of action, and a suit for a declaration can be brought within six years of each invasion. [P 104 C 2]

Kailas Nath Katju—for Appellants.

Surendra Nath Sen—for Respondent.

Judgment.—This is a plaintiff's second appeal. The facts of the case are as follows. In the year 1867 the father of the two plaintiffs, one Madan Gopal, was the mortgagee of certain zamindari rights in the village of Runni Chursai. There was a public unmetalled road which ran from the village lands of this village up to the pucca road some short distance away. This public road belonged to the State and still belongs to it. In 1867 there were no trees standing on it, and Madan Gopal, applied to the Collector of the District in writing pointing out this fact and that he wished to plant trees upon the public road for the benefit of the public, that he would tend and look after them, and that he would only claim the wood that might fall from the trees as his own. He would have no right to sell the trees. The Collector agreed to this and Madan Gopal planted these trees along the public road. It is

quite clear, as the land vested in the State, the ownership of the trees did not vest in Madan Gopal, but as the Collector had agreed to the condition that he was to take the fallen wood, he no doubt continued to take it so long as he remained in the village, but in the years 1885 and 1887 there were certain transfers of the zamindari shares in the village and Madan Gopal lost all interest in the zamindari of Mauza Runni Chursai.

In 1887 Badri Prasad became a co-sharer in the village by a sale-deed, under which his transferor purported to sell to him not only the zamindari share but also the trees which had been planted upon the road as being his. In 1890 and again in 1892 Badri Prasad sold the fruit of these trees to various persons. In 1899 he had some civil litigation in regard to the fruit of the trees against a third party. In 1901 the Chairman of the District Board, under whose control the road is, sold the fruit to a third party. Badri Prasad objected and the Collector cancelled his sale. In 1900 the trees were lopped and the loppings were sold by the District Board. Badri Prasad claimed title to the loppings. Madan Gopal objected to his claim. The Collector finally decided that Badri Prasad was entitled and paid over to him the proceeds from the sale of the loppings minus expenses. In 1901 Badri Prasad had some civil litigation against certain other persons who were co-sharers in this village. They had taken the fruit of the trees and he sued them for damages. They denied his title in every way to the trees or to the fruit.

The Court of first instance gave Badri Prasad a decree. On appeal the suit was dismissed by the District Judge, on the clear finding that Badri Prasad had not a shadow of a title whatsoever to the trees or to the fruit or to any of the produce thereof. Madan Gopal in that suit was called as a witness and testified to his claim and to the proceedings of 1867 on the basis of which the District Judge decided against Badri Prasad. In 1910 some more branches fell from these trees and there was a dispute between the plaintiffs, who are the sons of Madan Gopal, on the one side and Badri Prasad on the other. Again the proceeds of the sale of the wood were made over to Badri Prasad by the District Board. The present suit was brought within six years

from this, that is, on 18th March 1915 in the Court of the Subordinate Judge of Farrukhabad. The plaintiffs in their plaint claimed that they were the owners of and in possession of the trees; that they had been protecting and looking after the trees and had been taking all the produce thereof; that their father had been in continuous possession of the trees and that they were like him still in possession; that the defendant Badri Prasad had no right or title or interest whatsoever in these trees; that in the absence of the plaintiffs the defendant had realized the value of the wood from the District Board; that they had got to know of it in the month of November 1914, hence the present suit. They asked for a declaration that the trees were planted by their father; that they were still in possession of the trees and that they were the owners thereof. They further asked for an injunction restraining the defendant from interfering with the plaintiffs' right.

The defendant in reply pleaded that the land on which the trees stood was zamindari land and not the property of the state and that it belonged to the defendant; that the property had been sold and purchased by him in 1887 and that he was the owner and in possession of the trees; that the plaintiffs had no title whatsoever; that even if the defendant had no real title in the beginning, still he and his predecessors had been in proprietary and adverse possession and enjoyment of the trees since the year 1881, and therefore the suit was barred by limitation, the defendant having acquired title by prescription. The Court of first instance found that the trees were planted on the land of the road; that the land was the property of the state; that the trees had nothing to do with the zamindari of the defendant; that the plaintiffs' claim however was barred by 12 years' adverse possession and that they were not entitled to the declaration, the defendant having held adverse possession since the year 1885. In the course of the suit on 16th June 1915, the plaintiff's pleader, vide rubkar 65-A, clearly stated to the Court that his client only claimed a right to tend the trees and to take the fallen wood; that he claimed no greater right than this; that he had nothing to do with the fruit, etc. The plaintiffs appealed. The Court below has treated the case as if it

was clearly a suit in respect to the ownership of the trees and the possession thereof. It has said that the questions for determination in the appeal are: Whether the plaintiffs have been in possession within 12 years of the suit or whether the defendant has been in adverse proprietary possession for more than 12 years; also whether the suit is barred by limitation. In the preamble of its judgment the lower appellate Court has stated the facts as to the planting of the trees. In the body of its judgment it has stated as follows:

"No trees nor any rights in them were transferred to the defendants, nor are the trees standing on village lands."

Under the contract with the Collector the plaintiff's father reserved to himself only the right to take the fallen wood of the trees but nothing else. No rights in the trees could be transferred by the planter of the trees. The plaintiffs have no zamindari left in the village and they do not reside in mauza Runni Chursi. They brought this suit for a declaration that they were the owners of these trees and had the right to take the fallen wood and also for an injunction that the defendant should not interfere with the exercise of their right. The appellate Court held that the defendant had been in possession (presumably of the trees, though it does not say so clearly) for more than 12 years and has dismissed the appeal and the suit. The plaintiffs come here in second appeal. It is clearly admitted before us that the only right which the plaintiffs claim and can claim is the right to tend the trees and to take any wood that may fall; that they have no concern whatsoever with the fruit, and that they have no other right whatsoever in the trees. It is conceded before us on behalf of both parties that these trees, planted in the manner stated above and standing on public property belonging to the state, do not belong to either party; that in so far as they are in any one's possession, they are in possession of the Government. It is urged on behalf of the plaintiffs that there has been no adverse possession and cannot be any such adverse possession in a case like this, such as is contemplated by S. 28, Lim. Act. On behalf of the respondents, however, it is urged that so far as any right could be exercised by the parties, it has been regularly exercised by the defendant and his predecessors-in-title for well over 12 years. We

think it should be made quite clear that the only right which is in dispute before us is the right to take the fallen wood. Under the application of 1867 that was the only right which was given to Madan Gopal. The plaintiffs therefore are not and cannot be concerned with the fruit and if the District Board or the Collector has in the past allowed Badri Prasad to take the fruit, that is no concern of the plaintiffs, for they themselves have no right to it admittedly.

As to the fallen wood, there are only two years in which there has been any dispute whatsoever. One was in the year 1900 and the other was in the year 1910. In both these years there were disputes and in both years the Collector gave the value of the fallen wood to Badri Prasad. It is impossible therefore in our opinion to say that these two occurrences show that the defendant has been in adverse proprietary possession of the right which the plaintiffs now claim before us. There is no question of proprietary right in the trees. No doubt the parties litigated in respect thereto in the Courts below; but one fact is clear and that is that neither party is the owner of the trees and that the sole right in dispute before us is the right to take the fallen wood. We have considerable doubt whether S. 28, Lim. Act, has any application whatsoever to this case, but even assuming that it has, it is impossible to hold that by reason of the two disputes in 1900 and 1910, the defendant has established continuous adverse possession of this right as against the plaintiffs. The right is one which clearly can only be exercised on occasion, that is when any wood may fall or be cut from the trees. It does not occur every year or at stated time. It is urged that the plaintiffs' suit should have been brought at least within six years of the dispute of 1900, but we do not think the plaintiffs were bound to come into Court on the occasion of that invasion of their right. It was again invaded in the year 1910, and they have come into Court within six years of that invasion to establish their right to take the fallen wood.

We therefore cannot agree with the Court below that the suit is barred by limitation in any way at all. It has however been urged before us that the plaintiffs have no right whatsoever even to the wood under the petition and order

of the year 1867 and that this Court, therefore should grant them no declaration whatsoever. This is a point which has not been raised before in the course of this litigation. It amounts to asserting that Madan Gopal's right under the transaction of 1867 was purely a personal right which could be transferred neither by inheritance nor by sale, but this has not been the position which the parties have taken up in the Courts below. Badri Prasad's claim was actually based on a transfer in his own favour and the litigation having been fought out on the assumption that the right was a transferable and heritable one, we can see no necessity whatsoever to allow this point to be raised at this stage of the case. The District Board or the Secretary of State for India are neither of them parties to the present litigation and the decree therein will not affect them in any way. It will be time enough to decide this question when either of these two parties are involved in litigation with the plaintiffs or the defendant. This appeal is decided on the assumption that the right of Madan Gopal to take the fallen wood is a transferable right which descends to his heirs.

The result therefore of our findings is this that the plaintiffs are entitled to a declaration that they are entitled to take the fallen wood of the trees in dispute which were planted by Madan Gopal on the basis of his application of 1867 and that the defendant has no right to interfere with the plaintiffs' taking of that wood. There is no necessity whatsoever for any injunction as the exercise of this right can only occur from time to time, and the person who will be in possession of the wood will be the Collector or the District Board until either party claims it. The rest of the plaintiffs' claim is dismissed. In view of the exaggerations on either side in the course of this litigation and the fact that both parties claimed originally much more than they were entitled to, we think that the proper order as to costs of this litigation will be that each party shall bear their own costs throughout. We direct accordingly.

V.B./R.K.

*Decree modified.***A. I. R. 1918 Allahabad 105**

RICHARDS, C. J. AND BANERJI, J.

Mohamad Iltifat Husain — Decree-Holder—Appellant.

v.

Alim-un-nissa and others—Judgment-Debtors—Respondents.

Execution Second Appeal No. 296 of 1917, Decided on 10th April 1918, from a decree of Dist. Judge, Budaun.

Civil P. C. (1908), O. 34, R. 6—Application under O. 34, R. 6 is application in original suit for new decree and cannot be regarded as application for execution — Application is governed by Limitation Act (1908), Art. 181.

An application under O. 34, R. 6, is an application in the original suit for a new decree and it cannot be regarded as an application in execution. Such an application should be made within three years from the time when the right to make such application accrues and the article which governs the application is Art. 181.

[P 106 C 2]

Some mortgaged property was put up to sale in execution of a mortgage decree in 1911 and was purchased by the decree-holder. The proceeds of the sale being insufficient to satisfy the mortgage debt, the mortgagee made an application in 1913 under O. 34, R. 6, for a personal decree. That application proved ineffectual and he made another application for a similar decree in 1915:

Held, that the application, not being an application for execution of the original mortgage decree, was barred by time and that the interim application did not save limitation. [P 106 C 2]

Iqbal Ahmad and Mukhtar Ahmad—for Appellant.

S. A. Haidar and Muhamad Yusuf—for Respondents.

Judgment.—The appeal arises out of an application under O. 34, R. 6. This rule applies to cases in which after the mortgaged property has been sold the mortgagee comes to Court and asks for a personal decree for the balance left due. The rule provides that

"where the net proceeds of any such sale are found to be insufficient to pay the amount due to the plaintiff, if the balance is legally recoverable from the defendant otherwise than out of the property sold, the Court may pass a decree for such amount."

In the present case the original mortgage decree was obtained in February 1906. The mortgaged property consisted of two villages. In the events which happened the mortgagee became entitled to the equity of redemption of one of the villages the result being that the two interests (that is, the interest of the mortgagee and the interest of the mortgagor) vested in one person. This operated to discharge the mortgage to the extent of the value of the property acquired by the

mortgagee. In the year 1911 the other village was put up to sale and purchased by the decree holder. Accordingly the mortgaged property and all rights in respect of it were exhausted in the year 1911, and it was on this basis that the application for a personal decree was made. The application was made in the year 1915, but there was another application for a similar decree in the meantime (1913). If the present application can be regarded as an application for execution of the original mortgage decree, then perhaps the application which was made in 1913 would save limitation. If, on the other hand, the present application is not an application for execution of the original mortgage decree but is an application for a fresh decree, then the application should have been made within three years from the time when the right to make such application accrued, and the article which governs the application is Art. 181, Lim. Act. We find it impossible to hold that an application for a decree under the provisions of O. 34, R. 6, is an application for the execution of the original decree which was a decree for the sale of certain property; we think that it is an application in the original suit for a new decree and that it cannot be regarded as an application in execution. In a somewhat similar case of *Behari Lal v. Bisheshar Dayal* (1), Chamier J. seems to have expressed the view that Art. 181 governs an application for a decree under O. 34, R. 6. In this view the order of the Court below dismissing the application was correct, although the reasons for the Court's decision may be open to question. We dismiss the appeal with costs.

V. S./R. K. *Appeal dismissed.*

1. (1912) 14 I O 591.

A. I. R. 1918 Allahabad 106

BANERJI, J.

Jai Narain Lal and others—Accused—Applicants.

v.

Emperor—Opposite Party.

Criminal Revn. No. 125 of 1918, Decided on 13th April 1918 from order of First Class Magistrate, Etawah.

Criminal P. C. (1898), S. 435—Evidence same against absconding accused—Others acquitted—Order to continue proceedings against absconders held improper and High Court can interfere under S. 435.

A complaint having been lodged against eight

persons the Magistrate tried five of them, the other three having absconded. At a later stage however they surrendered but they were not put on their trial. Having considered all the evidence for the prosecution, the Magistrate came to the conclusion that the complainant had failed to establish the charge against the accused, and after acquitting the five accused on their trial he asked for orders from the District Magistrate as to whether the prosecution should be continued against the other three. The District Magistrate, though of the opinion that the evidence against them being the same as that produced against the other accused the prosecution could not succeed, nevertheless ordered the continuance of proceedings against them directing the transfer of the case to another Magistrate for trial:

Held: that the High Court was competent to interfere in the matter under S. 435, Criminal P. C., and that having regard to the judgment of the trial Magistrate and to the observations of the District Magistrate, the prosecution of the applicants should not be proceeded with as no useful object could be served thereby. [P 107 C 1]

C. Dillon and J. M. Banerji—for Applicants.

R. Malcomson—for the Crown.

Judgment.—This is an application for revision of an order of the District Magistrate directing the prosecution of the three applicants. It appears that a complaint was made against the three applicants and five other persons charging them with offences under Ss. 147, 325 and 452, I. P. C. The case was tried by a Magistrate of the first class against five of the accused. The three applicants, Jai Narain, Kunj Behari and Sanwalia, had not been arrested when the proceedings were commenced. At a late stage of the proceedings they surrendered but the Magistrate did not place them on their trial. The Magistrate however considered the evidence for the prosecution, considered all the circumstances of the case, inspected the locality and came to the conclusion that the prosecution had hopelessly failed to establish the charge made by the complainant against the accused. The case of Jai Narain and Kunj Behari was exactly the same as that against some of the other accused. The same charge was brought against Sanwalia also, but he was not named in the first report. After acquitting the other accused the Magistrate who had tried the case made a report to the District Magistrate in which he said that it was useless to proceed against the applicants after what he had said in his judgment, but he asked for orders as to whether the prosecution should be continued against the persons. The Magistrate of the district in his

order says that the evidence against the applicants could only be the same as that produced against the other accused and that as that evidence was not credible, the prosecution of the applicants on the same evidence would in all probability be futile. He also remarked that it was doubtful whether any conviction would be likely to succeed.

Still he ordered the continuance of the proceedings against these accused and he directed the case to be transferred to another Magistrate for trial. Against this order the present application has been filed. Having regard to the judgment of the trial Magistrate in the case against the other accused and to the observation of the learned District Magistrate to which I have referred, it is clear that no useful purpose will be served by the continuance of proceedings against the applicants. Under these circumstances I do not think the prosecution of the applicants should be proceeded with. That this Court can interfere in a matter like this under S. 435, Criminal P. C., appears from the judgment of this Court in *Chada T. N. v. Emperor* (1) and the case referred to therein. I accordingly allow the application and set aside the order of the District Magistrate, dated 2nd February 1918, directing the prosecution of the applicants.

V.B./R.K. *Application allowed.*

1. (1916) 18 Cr L J 46=36 I C 878.

A. I. R. 1918 Allahabad 107

BANERJI AND TUDBALL, JJ.

Emperor

v.

Ghulam Husain—Opposite Party.

Criminal Appeal No. 93 of 1918, Decided on 1st March 1918, from order of Addl. Sess. Judge, Gorakhpur.

Arms Act (1878), S. 19 (f)—Minor in possession of arms without license is guilty under S. 19 (f).

There is nothing in law which prevents a minor from being in actual fact in possession of arms without a license or which prevents him from being guilty of an offence under S. 19, Cl. (f). [P 108 C 1]

An Honorary Magistrate, who was exempt from the operation of the Arms Act and kept certain arms, died leaving behind him a pardanashin woman as a widow and a minor son. No license was obtained by the son for the arms, but they were retained in the house and were properly looked after :

Held : that the arms were in the custody and under the control of the minor and that he was guilty of an offence under S. 19 (f). [P 108 C 1]

A. E. Ryves—for the Crown.

C. R. Alston and *Abdul Raoof*—for Opposite Party.

Judgment.—This is a Government appeal against an order of acquittal passed by the Additional Sessions Judge of Gorakhpur in the case of the opposite party, Sheikh Ghulam Husain, who had been convicted by a Magistrate of the First Class for an offence under S. 19, Cl. (f), Act 11 of 1878 (the Arms Act.) The facts are simple. Sheikh Ghulam Husain is the son of one Khadim Husain who died in 1901. The family is of good social position and owns considerable property. Khadim Husain was an Honorary Magistrate and as such was exempt from the operation of the Arms Act. The family lives in a three-storied pacca building at Ganeshpur. At the death of Khadim Husain, Ghulam Husain was a boy of tender years. His younger brother was born a few months after his father's death. Mt. Amina Bibi is the widow of Khadim Husain. Apparently after the death of Khadim Husain, the weapons which he had in his possession remained in the family residence and no steps were taken to obtain a license for their possession. Ghulam Husain has grown up and at the time that this case occurred was on the verge of majority, being between the ages of 17 and 18 years.

On 12th September 1917, at 3 p. m. in the absence of Mt. Amina Bibi and of Ghulam Husain, the family house was searched and in it were found in the zenana quarters, locked up in almirahs, three guns, eight swords, one dagger, one kukhri and three old pistols. At the same time in the house were also found some spears on one of which was engraved Ghulam Husain's name. The weapons were all in good condition and apparently had been kept properly cleaned. There was some evidence given in the case to the effect that Ghulam Husain had been seen out in the open accompanied by a servant carrying a gun some days previous to the search. The Magistrate who tried the case held that the accused was in charge of the guns, that they were under his control and that he was responsible for their possession without a license under the Act. He therefore convicted him and sentenced him to a fine of Rs. 1,000. On appeal the learned Additional Sessions Judge has

held that the mother, Mt. Amina Bibi, being the manager of the family is the person who in law must be deemed to have been in possession of these weapons; that the accused being a minor cannot be held to have been in possession and therefore ought not to have been convicted. He accordingly set aside the conviction and sentence and acquitted Ghulam Husain. It is from this acquittal that the Local Government has preferred this appeal.

It is true that Ghulam Husain was not of full age at the time that these weapons were recovered, but there is nothing in law which prevents a minor from being in actual fact in possession of arms without a license or which prevents him from being guilty of an offence under S. 19, Cl. (f) of the Act. It is difficult for us to believe that a pardanashin lady like Mt. Amina Bibi would have taken any care or specially retained in her possession the weapons which were found in her house. It is clear that these weapons were retained and that they were cleaned and properly looked after. In the same room with these weapons was the spear belonging to Ghulam Husain himself on which his name was engraved and it is clear, therefore that he took an interest in the weapons. There is no reason to believe that they were in his custody and under his control and that he has, as a matter of fact, committed the offence under S. 19, Cl. (f) of the Act. Whether his mother has committed the same offence or not is not a question which we have to decide in this appeal, but we can see nothing in the present case to prevent it being held on the evidence that the weapons were under the control of Ghulam Husain and not of his mother. In the circumstances of the case we do not think that so heavy a fine as Rs. 1,000 was called for. Khadim Husain left behind him a pardanashin woman as a widow and a small boy. These weapons had probably been lying in the house for years owing more or less to the neglect of the District Magistrate in not having taken proper action on the death of Khadim Husain. The offence committed is one for which a more or less nominal punishment will suffice. We therefore allow the appeal, set aside the order of acquittal and restore the conviction of Ghulam Husain under S. 19, Cl. (f), Arms Act and

sentence him to pay a fine of Rs. 100 or in default to one month's simple imprisonment.

V.B./R.K.

Appeal allowed.

A. I. R. 1918 Allahabad 103

RICHARDS, C. J.

Gobardhan—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 1028 of 1917, Decided on 27th February 1918, from order of Offg. Dist. Magistrate, Etawah.

Criminal P. C. (1898), S. 110—Order under S. 110 requiring sureties to be "approved sureties"—Sureties residing in another police district and helping accused in defence is no ground for refusing.

Where an order to furnish security under S. 110, simply requires the sureties to be "approved sureties," the mere fact that the sureties do not reside in the same police district and have evidenced their friendship by helping the accused in his defence will not suffice in law to justify a refusal to accept the sureties. [P 103 C 2; P 109 C 1]

Satya Chandra Mukerjee and Brij Mohan Vyas—for Applicant.

R. Malcomson—for the Crown.

Judgment.—In this matter it appears that Gobardhan was ordered to furnish security under S. 110. The order upon him was that he should give security himself in the sum of Rs. 200 and two approved sureties of Rs. 100 each. If he complied with the terms of this order he was entitled to be released. Gobardhan has presumably given his own bond for Rs. 200. He has produced two sureties who are ready to give security to the extent of Rs. 100 each. The Magistrate has declined to accept the sureties on two grounds, first, that the sureties reside in another police station. Apparently they are not very far removed from the residence of the accused but they are not in the same police district. The second ground is that they assisted Gobardhan in his defence. It seems to me that the second ground is no legitimate ground for refusing to accept the sureties. Presumably it will always be some friends of a person against whom proceedings have been taken under S. 110, who will give security for him. It is very unlikely that any complete outsider, who has no interest whatever in the person charged, will undertake the responsibility. As I said before it must always be a friend who will undertake the responsibility. The mere fact that these sureties evidenced their friendship by helping in the defence

seems to me to be no reason at all for refusing to accept them as sureties. The first ground is, as already stated, they reside in another police district. The order simply required that the sureties should be "approved sureties." This I think to mean that they should be themselves persons of good character and solvent. I think therefore that both the grounds upon which the learned Magistrate refused to accept the sureties are not sufficient in law to justify his doing so. The matter will now go back to the Magistrate, who will deal with the matter having regard to what I have said above.

V.B./R.K.

Case sent back.

*** A. I. R. 1918 Allahabad 109 (1)**

PIGGOTT, J.

Mohamad Ali Khan—Applicant.

v.

Raja Ram Singh—Opposite Party.

Criminal Rev. No. 138 of 1918, Decided on 4th May 1918, from order of First Class Magistrate, Azamgarh.

* Criminal P. C. (1898), S. 250—S. 250 speaks of whole case and contemplates trial or inquiry ending in unqualified acquittal—Where accused is charged under different sections and is acquitted under one but convicted under others S. 250 does not apply.

Section 250 speaks of "the case" as a whole and contemplates a trial or inquiry ending in the unqualified acquittal or discharge of the accused. A complainant who, having a genuine grievance, wilfully exaggerates or distorts the same in order to aggravate the case against the accused is liable, in the discretion of the trial Court, to be prosecuted for any offence against the Indian Penal Code which he may have committed, but the policy of the Legislature seems to be to limit the summary jurisdiction of the Court under S. 260 to simple cases, in which the complainant is found to have been wholly in the wrong.

[P 109 C 2]

Complainant charged accused under Ss. 500 and 506, Penal Code. The accused was convicted on the former and acquitted on the latter charge and the complainant was ordered to pay compensation to the accused, on the ground that the charge of criminal intimidation was frivolous or vexatious.

Held: that the provisions of S. 250 did not apply to such a state of facts, unless the accused was discharged or acquitted altogether.

[P 109 C 2]

*Iqbal Ahmad—for Applicant.**Peary Lal Banerji—for Opposite Party.*

Judgment—Raja Ram Singh was tried at one trial by a Magistrate of the First Class on two charges framed under S. 506 and S. 500, I. P. C. He was acquitted on the former and convicted

on the latter charge. The complainant Muhammad Ali Khan has been ordered to pay a compensation of Rs. 25 to Raja Ram Singh on the ground that the charge of criminal intimidation was frivolous or vexatious. The question I have to determine is whether this order is legal in view of the fact that Raja Ram Singh was convicted on one of the two charges against him. I must take it that the complainant's case was that the two offences in question were committed in the course of one series of acts so connected together as to form the same transaction, otherwise they would have been separately charged and tried separately. The provisions of S. 250, Criminal P. C. will not apply to such a state of facts, unless the Magistrate who tried the case discharges or acquits the accused altogether. The section speaks of "the case" as a whole and contemplates trial or inquiry ending in the unqualified acquittal or discharge of the accused. A complainant who, having a genuine grievance, wilfully exaggerates or distorts the same in order to aggravate the case against the accused is liable, in the discretion of the trial Court, to be prosecuted for any offence against the Indian Penal Code which he may have committed; but the policy of the Legislature seems to be to limit the summary jurisdiction of the Court under S. 250, Criminal P. C. to simple cases in which the complainant is found to have been wholly in the wrong. There is authority for this view in the case of *Mukti Bewa v. Jhotu Santra* (1). I think that case was rightly decided and that it covers the facts now before me.

I set aside the order directing Muhammad Ali Khan to pay Rs. 25 as compensation. The money, if paid, will be refunded.

V B./R K.

Order set aside.

1. (1897) 24 Cal 58.

A. I. R. 1918 Allahabad 109 (2)

BANERJI, J.

Abdul Rashid—Accused—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 91 of 1918, Decided on 6th April 1918, from order of Addl. Sess. Judge, Moradabad.

Penal Code (1860), S. 482—Fraudulent intention is ingredient of offence—In its absence conviction is improper.

It was agreed between different Oil Companies that tins belonging to one company might be used by another company provided that the latter company put upon the cap of the tin a distinctive mark indicating that the oil contained in the tin was the oil of the company which was using the tin. Accused sold eight tins of the Standard Oil Co. containing the oil of the Burma Oil Co. Two only of the tins bore the distinctive mark of the latter company. It was found that the accused told the purchaser at the time of the sale that the tins contained the oil of the Burma Oil Co.

Held; that the accused had used a false trade-mark, but that there being no intent to defraud he could not be convicted of an offence under S. 482. [P 111 C 2]

C. Dillon, S. M. Sulaiman and Satya Chandra Mukerji—for Applicant.

R. Malcomson—for the Crown.

Judgment.—The accused in this case has been convicted under S. 482, I. P. C. of having used a false trade-mark. The accused is the agent of the Burma Oil Co. The trade-mark which he is said to have used is the trade-mark of the Standard Oil Co. of the United States. Since the war it had been agreed between different oil companies that tins belonging to one company might be used by another company, provided that the other company put upon the cap of the tin a distinctive mark indicating that it was the oil of the company which was using the tin. In the case of the Burma Oil Co. they had to put on the cap the word "Victoria" showing that the oil, though contained in the tin of the Standard Oil Co. was oil of the Burma Oil Co. It has been proved that the accused sold eight tins of kerosine oil to one Shekhar Chand. The caps of two of the tins bore the word "Victoria" the remaining six had only plain caps. It is in respect of these tins that the accused has been convicted. Two questions arise in this case. The first is whether the accused used a false trade-mark and the second is whether he has proved that he did not use the trade-mark with intent to defraud? As to the first point it has been fully established that in using tins which had plain caps on them he used a false trade-mark. S. 480, I. P. C. defines what is meant by a false trade-mark. According to that section whoever used any receptacle with any mark thereon in a manner reasonably calculated to cause it to be believed that the goods contained

in such receptacle were the manufacture or merchandise of a person whose manufacture or merchandise they were not, was said to use a false trade-mark. In the present case if there was no mark on the cap the accused used a receptacle which was reasonably calculated to cause it to be believed that the goods contained in the tins were the manufacture of the Standard Oil Co. and not of the Burma Oil Co. Therefore in using the tins of the Standard Oil Co. without putting on the cap the mark of the Burma Oil Co. he used a false trade-mark. We have next to see whether the accused has been able to prove that he acted without intent to defraud because if he proved that he had acted without such intention, he would not be punishable under S. 482, I. P. C.

The accused sold the tins in question to one Shekhar Chand. Shekhar Chand was examined as a witness and he clearly swore that at the time that he bought the tins from the accused the latter told him that they contained not the oil of the Standard Oil Co. but the oil of the Burma Oil Co. and that the price agreed upon was the price prevailing in the market of the Burma Oil Co.'s product. If that statement was true there was no fraud in the case and it was apparent that there was no intention to defraud. There was nothing to show that there was any conspiracy or collusion between Shekhar Chand and the accused. Shekhar Chand is not a dealer who sells kerosine oil in the neighbourhood of the place where the accused carried on his business. The Courts below have not disbelieved him. If Shekhar Chand sells this oil, which he knew to be the oil of the Burma Oil Co. and which he had purchased as such, as oil manufactured by the Standard Oil Co. he would be punishable under S. 486, I. P. C. but that would not justify the conviction of the accused under S. 482. This being so, it seems to me that the conviction under S. 482, I. P. C. cannot be sustained. I allow the application, set aside the conviction and sentence and direct that the fine imposed on the accused, if paid, be refunded.

V.B./R.K.

Conviction set aside.

—

* A. I. R. 1918 Allahabad 111 (1)

TUDBALL, J.

Emperor.

v.

Bahawal Singh—Accused.

Criminal Ref. No 868 of 1917, Decided on 6th November 1917, made by Dist. Magistrate, Benares.

* Criminal P. C. (1898), S. 250—Information of offence charging certain person given to another—Other lodging complaint—First informer is person within S. 250 on whose information accusation is made.

Where one person gives information to another charging a third person with an offence with the intention that the information should be conveyed to a Magistrate with a view to a prosecution, the person first giving the information is the person upon whose information the accusation is made within the meaning of S. 250. [P 111 C 2]

Judgment.—The District Magistrate, Benares has referred the case to this Court with the recommendation that the order passed under S. 250, Criminal P. C., directing Jagmohan Dom to pay Rs. 10 as compensation to the Police constable, be set aside. Jagmohan Dom gave information to the Revd. G. Spooner of the Wesleyan Mission to the effect that the accused constable had extorted from him the sum of Rs. 10. The Revd. G. Spooner made an enquiry on his account and then reported the matter to the District Magistrate. The District Magistrate thereupon directed the prosecution of the constable. The Court trying the case found the charge frivolous, acquitted the accused, and directed Jagmohan to pay compensation. The Magistrate in his reference merely states that the order does not appear to him to be legal. He does not give any grounds for his belief of opinion, S. 250 says that "if in any case instituted upon information given to a Magistrate, a person is accused of any offence before a Magistrate and the Magistrate by whom the case is heard discharges or acquits him and is satisfied that the accusation against him was frivolous or vexatious, the Magistrate may, in his discretion, direct the person upon whose information the accusation was made to pay compensation to the accused."

The question therefore is whether it was upon the information of Jagmohan Dom that the accusation against the constable was made. The information in the present case, no doubt, was conveyed to the District Magistrate through the Revd. G. Spooner. If Jagmohan Dom gave the information to the Missionary with the intention that it should be conveyed to the District Magistrate with a view to a prosecution, then clearly Jagmohan Dom

was the person upon whose information the accusation was made. The mere fact that he utilised the Missionary for the purpose of conveying the information to the District Magistrate cannot protect him. If, on the other hand, he merely in conversation told the Missionary about the case without any desire for or view to a subsequent prosecution or to the conveyance of the information to the District Magistrate, then he was hardly liable for the intervention of a busy body who took it upon himself to make a complaint to the District Magistrate. In this latter circumstance, it would be the Revd. G. Spooner who would be liable to pay compensation. I have examined the letter sent by the Missionary to the District Magistrate, and that letter is sufficient to show that Jagmohan did intend to make a complaint with a view to securing the punishment of the constable. It clearly therefore was upon his information that the accusation against the constable was made in Court before the Trying Magistrate. In these circumstances I do not think that the order passed was illegal. Let the record be returned.

V.B./R.K.

Record returned.

A. I. R. 1918 Allahabad 111 (2)

PIGGOTT, J.

Abdul Latif Khan—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 945 of 1917, Decided on 1st March 1918, from order of Dist. Magistrate, Etah.

(a) Criminal P. C. (1898), S. 437—Accused discharged—Order of further inquiry without notice is not illegal—But in judicial discretion it is advisable to give previous notice.

Nothing in S. 437, requires previous notice to any accused person who has been discharged before further inquiry into his case is ordered by a competent authority that is to say by the High Court, the Sessions Judge or the District Magistrate. Nevertheless as a matter of judicial discretion it is advisable that previous notice should issue when the matter for consideration is the setting aside of an order of discharge passed in favour of an accused person who has actually been before a Court to answer the facts alleged against him. [P 112 C 2]

(b) Criminal P. C. (1898), S. 342—Person accused with another in inquiry resulting in discharge—He can be competent witness in further inquiry.

The fact of a persons being in the position of an accused with another during an inquiry which resulted in the order of discharge, should not at all prevent his being summoned as a witness in the further inquiry ordered. [P 113 C 1]

A. H. C. Hamilton—for Applicant.

R. Malcomson—for the Crown.

Judgment.—This application in revision arises on the following state of facts: On the 17th July last a woman named Dojia was struck by a bullet while she was with her husband in a field where he was working. The shot had been fired by some sportsman in the immediate neighbourhood, and it is not suggested that the injury to Mt. Dojia was anything but accidental. A number of villagers were attracted to the spot and proceeded to arrest two Mahomedans, named Abdul Latif Khan and Badal Khan, as being responsible for the injury caused to Mt. Dojia. These two men were taken to the Kasganj Police Station, some five miles distant, along with the injured woman and her husband and at the same time there was produced at the police station a double barrelled muzzle loading gun. The two Mahomedans arrested on suspicion were admittedly strangers to Mt. Dojia and her neighbours. The police eventually sent up one of these men, Abdul Latif Khan, for trial in respect of offences under S. 338, I. P. C., and S. 19, Arms Act. The Magistrate who took cognizance of the matter began by issuing process against the other stranger Badal Khan: but after taking the evidence discharged both the accused persons. The order of discharge is dated 21st September 1917. The gun in question although bearing a serial number and therefore having apparently at some time or other been held lawfully under a license could not be traced in the Etah district; and it is admitted that Abdul Latif Khan and Badal Khan held no license to possess fire arms of any description. Representations were made to the District Magistrate as to the impropriety of the order of discharge, and on 10th November 1917 the District Magistrate, after examining the record, passed an elaborate order, reviewing the evidence discussing the comments made on the same by the Trying Magistrate and finally directing further inquiry to be made as regards Abdul Latif Khan. This order was of course passed under S. 437, Criminal P. C. It is quite clear that no previous notice had been issued to Abdul Latif Khan to show cause why the order of discharge passed in his favour should not be set aside. A curious feature of the case is that before that order had been set aside at all, that

is to say, on 7th November 1917, another First Class Magistrate of the Etah district had taken cognizance of the offence and had issued process to Abdul Latif Khan to appear and answer charges under S. 338, I. P. C., and S. 19, Arms Act. However, the question whether Abdul Latif Khan could have been retired by another Magistrate without the order of discharge passed on 21st September 1917 being first set aside, is not now before me and I need not discuss it. The application in revision which I have to consider is against the District Magistrate's order of 10th November 1917.

Now it is beyond question that nothing in S. 437, Criminal P. C., requires previous notice to any accused person who has been discharged before further inquiry into his case is ordered by a competent authority that is to say by the High Court or the Sessions Judge or the District Magistrate. Nevertheless it has been laid down in a number of cases that as a matter of judicial discretion it is advisable that previous notice should issue, when the matter for consideration is the setting aside of an order of discharge passed in favour of an accused person who has actually been before a Court to answer the facts alleged against him. I am not aware that the decision of this Court in *Queen-Empress v. Ajudhia* (1), which itself follows certain older decisions, has ever been disapproved of in any subsequent decision of this Court. I am myself of opinion that in a matter of this sort it would have been better for the District Magistrate to give Abdul Latif Khan previous notice and an opportunity of arguing the case before him. I am not disposed however to interfere with the order of the Court below merely on this ground. If the only result of my doing so were to compel the District Magistrate to issue notice now to Abdul Latif Khan, this might only lead to the passing of another order under S. 437, Criminal P. C., and the only result would have been inconvenience to the Courts and undesirable delay in the disposal of the matter. If on the other hand I were to take it upon myself to direct that no further proceedings be taken, I conceive that I should be straining the powers of this Court, and I am not satisfied that I should not be prejudicing the interests of justice. I have preferred to deal with the matter by ask-

ing the learned Advocate who represents Abdul Latif Khan to take this opportunity of showing cause why further inquiry should not be ordered. In substance I have dealt with the matter as if the record had been called for directly by this Court with a view to considering the propriety of the order of discharge. I do not think it would be advisable for me to enter into detail with regard to the very different opinions expressed by the Trying Magistrate and by the District Magistrate in respect of the value and reliability of the evidence produced at the original hearing. I do think however that the District Magistrate's order shows good and sufficient cause for further inquiry into this matter in the interests of justice. It seems practically beyond question that an offence punishable under the Arms Act, as well as an offence punishable under the Penal Code, were committed by some person or other on the occasion in question. I agree with the District Magistrate that it is in the interests of justice that there be further inquiry into the question whether the commission of one or both of these offences is or is not brought home to the accused Abdul Latif Khan. I think it advisable under the circumstances that this inquiry should take place outside the limits of the territorial jurisdiction of the District Magistrate of Etah. My order therefore is that this application for revision do stand dismissed, and that the further inquiry against Abdul Latif Khan directed by the order of 10th November 1917 be held in the district of Aligarh. I transfer the case in question to the Court of the District Magistrate of Aligarh, who may either dispose of it himself or transfer it for disposal to the Court of any First Class Magistrate subordinate to himself.

With regard to one matter of detail which has been pressed upon my notice I may say that I agree with the District Magistrate that the proceedings taken against Badal Khan were injudicious, and that the fact of his having been in the position of an accused person during the inquiry which resulted in the order of discharge should in no way be considered to prevent his being summoned as a witness in the further inquiry now ordered.

V.B./R.K. *Further inquiry ordered.*

A. I. R. 1918 Allahabad 113

PIGGOTT, J.

Babu Ram—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 303 of 1918, Decided on 15th July 1918, from order of Mainpuri, D/- 8th April 1918.

(a) Criminal P. C. (1898), S. 103—Search of house—Evidence of witness present at search—Court is not bound to accept.

A Court is not bound to accept as true the evidence of witnesses called in under S. 103, to witness a search, if it can be shown to be false.

[P 114 C 1]

(b) Arms Act (1878), Ss. 19 (f) and 30—Offence punishable under S. 19 (f)—Power of search—How to be exercised explained.

The power of search in respect of an offence punishable under S. 19, Cl. (f) must by virtue of S. 30 of the Act, be exercised in the presence of some officer specially appointed by name or in virtue of his office by the Local Government in this behalf.

[P 115 C 1]

(c) Arms Act (1878), Ss. 19 (f) and 30—Search without warrant by police officer specially empowered to conduct searches, is not illegal.

Where a Police Officer in charge of a reporting station is specially empowered by the Local Government to conduct searches in respect of offences under S. 19, Cl. (f), Arms Act, a search conducted by such officer in respect of an offence under that clause without obtaining a warrant from a Magistrate is not illegal.

[P 115 C 1]

C. R. Alston and A. P. Dube—for Appellant.

Lalit Mohan Benerji—for the Crown.

Judgment—Babu Ram appeals against his conviction on a charge under S. 19 (f), Arms Act (11 of 1878). The case against him is that he had in his possession and under his control two swords, one gun, one pistol and certain ammunition in contravention of the provisions of the Arms Act, that is to say, without having any license for the same. The evidence has been fully set forth and discussed in the admirably lucid and convincing judgment of the Sessions Court and I do not propose to go into it at length. The essential facts are that a certain house was searched upon information given by one Khiali Ram, who has been produced as a witness for the prosecution and that the arms which are the subject-matter of the charge were found in a receptacle formed by hollowing out a log of wood, the receptacle itself being buried underground in a small room in a corner of the building. The case for the defence is that the discovery of the arms in that place does not prove that they were in the possession or under the control of Babu Ram.

The suggestion further is that it is a matter of fair inference from the evidence that they had been concealed in that place by enemies of Babu Ram in order to get him or his father Hulas Rai into trouble. The decision of the questions thus raised must depend upon the proper appreciation of certain evidence given by Sub-Inspector Mafuz Ali Khan and the witnesses Angan Lal and Sikhar Chand on the one side, and the witnesses Maharaja Singh, Chunni Lal and Gokul on the other. Maharaj Singh and Chunni Lal were official witnesses to the search, that is to say, the witnesses from the neighbourhood of the appellant's house whose attendance had been procured by the Sub-Inspector in accordance with the S. 103, Criminal P. C. The Sub-Inspector had complied with the law by calling in these two persons, but the fact that he had done so does not bind the Court to accept as true their evidence if it can be shown to be false. In the present case the Sub-Inspector for reasons sufficiently apparent had taken the trouble to secure the attendance of two other witnesses; the evidence given by himself and by these men, Angan Lal and Sikhar Chand receives strong corroboration from the unimpeachable testimony of Rai Bahadur Man Singh, Superintendent of Police, and Mr. Sheo Rakhan Singh, Deputy Magistrate. I have not the slightest doubt, after an examination of the record that the learned Session Judge, who had the concurrence of the Assessors, was perfectly right in rejecting the evidence of Maharaja Singh, Chunni Lal and Gokul. Anything less convincing on the face of it I have rarely read. Their assertion that the house in question had been lying vacant for years is conclusively disproved by the observations made on a subsequent date by the Superintendent of Police and the Deputy Magistrate. The most crucial point in their evidence namely, the assertion that the Sub-Inspector on entering the house went straight to the remote and somewhat isolated chamber in which the discovery was made, is introduced in a singularly unconvincing manner in the evidence of Maharaj Singh, and is, in my opinion, quite sufficiently contradicted by the ordinary probabilities of the case. The conduct ascribed to the Sub-Inspector by the defence evidence is that of a man at once unscrupulous and singularly guile-

less and open in betraying himself by his actions. I am satisfied that the inner room in which these arms were found was under the control and in the exclusive possession of the appellant Babu Ram. He had the key of the outer door of the house in his own possession. He was the only inhabitant of the house (along with his family) at the time of the search, and he produced from his own possession the key of the inner room from which alone the small closet in which the unlicensed arms were found could be approached.

I have not been asked by the prosecution to reconsider the question whether the learned Sessions Judge was right in refusing to record the conviction in this case under Cl. 1, S. 20, Act 11 of 1878. Personally I find it difficult to understand with what purpose the offences mentioned in Cl. (f), S. 19 of the said Act are included in the list of offences specified in the first portion of S. 20, if that section was not intended to apply to such a case as the present. The question must not be confused by reference to the wholly distinct question of the scope of Cl. 2, S. 20, Act 11 of 1878, in respect of which I in no way dissent from the opinion pronounced by a learned Judge of this Court in the case of *Ram Sarup v. Emperor* (1). The sentence passed however was within the power of the Court below under S. 19, Act 11 of 1878, and I see no adequate reason for making a formal alteration in the conviction. A strong point has been made on behalf of the appellant of the alleged illegality of the search of this house by the Sub-Inspector Mafuz Ali Khan, without a warrant from a Magistrate. I find nothing in the provisions of Ch. 7, Arms Act to make such a search illegal. S. 25 deals with the special case of a Magistrate who receives information that a person who has arms, ammunition or military stores in his possession, is keeping them for some unlawful purpose or that for any other reason such person cannot be allowed to remain in possession of the same without danger to the public peace.

In cases falling under S. 25 it is wholly irrelevant whether the arms, ammunition or military stores in question are or are not covered by license. Unlicensed possession of arms punishable under S. 19, Cl. (f), Act 11 of 1878, is a cognizable

1. (1906) 28 All. 809.

offence, and is therefore an offence which under the Criminal Procedure Code a great many police officers are entitled to investigate. In the conduct of such an investigation a search for the purpose of discovering the arms in respect of which it is believed that an offence has been committed would be legal under S. 165, Criminal P. C. The legislature however has seen fit to restrict the powers of police officers in the matter of offences punishable under S. 19, Cl. (f), Arms Act, by the special provisions of S. 30 of the said Act. The power of search in respect of an offence punishable under that particular clause of the Act is required to be made in the presence of some officer specially appointed by name or in virtue of his office by the Local Government in this behalf. The Local Government has seen fit to empower, amongst other persons, police officers in charge of reporting stations, by virtue of their office, to conduct such searches. Sub-Inspector Mafuz Ali Khan was on the date in question an officer in charge of a reporting station and there is nothing illegal in the action taken by him. I am quite satisfied that the appellant has been rightly convicted and I am not prepared to interfere with the severity of the sentence passed by the Court below. I think the learned Sessions Judge has given an adequate reason for the same. I dismiss the appeal. The appellant must surrender to his bail to undergo the unexpired portion of his sentence.

V.B./R.K.

*Appeal dismissed.***A. I. R. 1918 Allahabad 115**

TUDBALL AND ABDUL RAOOF, JJ.

Balwant Singh — Judgment-debtor — Appellant.

v.

Joti Prasad and others — Decree-holders — Respondents.

Execution First Appeal No. 160 of 1918, Decided on 15th July 1918, from a decree of Sub-Judge, Saharanpur.

Hindu Law — Adoption — Widow — Widow allowed to remain in possession of estate till death — Vested right is created in favour of son — Transfer of such vested right is unaffected by Transfer of Property Act (1882), S. 6 (a).

Where on an adoption being made by a Hindu widow it is agreed between the widow and the natural father of the adopted son, acting on the latter's behalf, that the widow should remain in possession of her husband's estate till her death, a vested right in the estate is created in favour of

the adopted son and merely his right of enjoyment and possession is postponed till after the death of the widow. A transfer of such vested right by adopted son during the widow's lifetime is unaffected by S. 6 (a). [P 119 C 2; P 120 C 1]

Nehal Chand — for Appellant.*B. E. O'Connor and Lakshmi Narain* — for Respondents.

Judgment.—This appeal arises out of an execution proceeding under two decrees, dated (1) 22nd June 1917 and (2) 15th December 1917, both of which were passed in one and the same suit 63 of 1915, (1) Rai Bahadur Lala Joti Prasad, (2) Lala Raghunath Singh and (3) Lala Beni Prasad, plaintiffs versus (1) Choudhri Balwant Singh, (2) Rana Indar Singh defendants. The application for execution was made on 17th December 1917, and the prayer made was that possession over Talluqa Naogawn, entered in the list annexed to the application, be delivered to the decree-holders against the judgment-debtors 1 and 2. A further prayer was that the Collector of Saharanpur, who was in possession of the property as a receiver, be asked by a Rubkar to deliver possession of the said property to decree-holders and to hand over to them such sums of money as may be with him in deposit, on account of the profits of the said property. Objections were raised by Balwant Singh, judgment-debtor, to the execution of the decree. Those objections have been disallowed by the learned Subordinate Judge of Saharanpur by his judgment, dated 5th April 1918. Choudhri Balwant Singh, judgment-debtor, has appealed and in the memorandum of appeal has raised pleas embracing almost all the objections which he had raised in the Court below. In order to appreciate the pleas raised and the argument addressed to the Court on behalf of the appellant it is necessary to state shortly the previous history of the litigation. One Raja Raghubir Singh was the owner of a considerable property known as the Landuara Estate. He died in the year 1868, leaving Rani Dharamkuar, who was pregnant at the time, as his widow.

It is an admitted fact that before his death he permitted and authorized his widow to adopt a son for him, in case the child born of the widow died in its infancy. He further gave permission to adopt another son in case the one adopted was to die in his childhood, in her life time. A child was born after the death of Ra-

ghubir Singh, but he having died, Rani Dharamkuar adopted one Indar Singh, in 1877. The latter having died, she adopted one Rambadan Singh in 1883, who also having died in 1885, one Bharat Singh was selected in 1893 for adoption but before his adoption had taken place, he died in 1896. Eventually Choudhry Balwant Singh, the appellant in this appeal, was adopted on 13th January 1899 and a deed of adoption was executed on that date and was formally registered. The material portions of the said deed having a bearing upon the questions in dispute in this appeal are these: In p. 3, it is stated that on the death of the Raja, Rani Dharamkuar entered into proprietary possession of all kinds of property (*Har qism matrukah ki malik o mustahiqq o qubiz hui*) and that she was in possession of all the property belonging to the Reyasat of the said Raja Saheb at the time of the execution of the document. In para. 4, it is stated that being the owner of a considerable property, the Raja in his lifetime, owing to religious needs and other requirements was anxious to have a son born who may fulfil the religious needs and who may be the owner of the Reyasat. In para. 5, it is stated that as the lady, at the time of his last illness, was pregnant, he did not adopt a son himself in his lifetime. In para. 6, it is stated that during his last illness, having suddenly become hopeless of his life, he by way of precaution, directed the lady,

"that in case a daughter is born or if a boy having born dies, I enjoin upon you and order you that you should adopt a boy for me, so that he may keep our name alive and after your death may be the absolute owner and possessor of my entire estate and if perchance the son adopted, according to this permission, dies in your lifetime then you will continue to have the power of further adoption"

In para 10, it is stated that she in June 1898 selected Choudhri Balwant Singh, son of Choudhri Ramnawaz, for the purpose of adoption and from that date the said Balwant Singh came under her protection and was brought up by her. In para 11, it is stated that the executant adopted Choudhri Balwant Singh on 13th of January 1899. In para. 12, it is stated that

"The said Balwant Singh will be considered the adopted son of Raja Raghubir Singh and of the executant and he will perform all the religious duties towards the said Raja Saheb and the executant after the death of the executant, and after her death he will be the absolute owner of the

property of the Reyasat Landhaura. The most important provision is contained in para. 13, which runs thus: "That during her lifetime the executant will continue to have all the rights over all the properties of the reyasat of Landhaura left by Raja Raghubir Singh which a Hindu widow has over her husband's estate according to the Hindu law and that she will continue to be the owner and in possession as before, that the said Balwant Singh, my adopted son will have no right to interfere with my rights of ownership and with the management and supervision of the reyasat during my life. But the said adopted boy will be maintained according to his position and status and he will be properly brought up and that she has adopted Balwant Singh on these conditions and Choudhri Ramnawaz, the father of Balwant Singh has given him in adoption on these very conditions and this was in accordance with the wish and permission of the Raja Saheb . . ."

On the same date Choudhri Ramnawaz Singh executed an iqrarnama in which, after mentioning that he had willingly given his son Choudhri Balwant Singh, aged 16 years, in adoption to Rani Dharamkuar, he stated.

"that from this date the son ceases to have any connexion with his natural family and that the said son will, from to-day, acquire all the rights which an adopted son has under the law in all the property left (*matrukah*) by Raja Raghubir Singh deceased and which are in the possession of the Rani Saheba. But it has been agreed between me and Rani Saheba that according to the wish and permission of Raja Raghubir Singh the Rani Saheba will continue to be *malik aur kabiz* (owner and in possession) of the entire reyasat during her life"

Disputes having arisen between Choudhri Balwant Singh and his adoptive mother, Rani Dharamkuar the latter instituted a suit against him in 1905 with the object of getting rid of him. It is unnecessary to give the details of that litigation; it is enough to state that the suit was dismissed and Choudhri Balwant Singh was successful. His position as the adopted son of Raja Raghubir Singh was made secure. In 1911 Choudhri Balwant Singh filed a suit No. 1 of 1911 against Rani Dharamkuar for possession of the properties of the reyasat Landhaura, but the defendant having died during the course of the suit, in the month of November 1912, the further prosecution of the suit became unnecessary. During the course of the litigation with Rani Dharamkuar, Balwant Singh had to mortgage and sell portions of the property of the reyasat in order to procure funds to carry on the fight with his adoptive mother. The property, the subject matter of the present dispute viz., Mauza Ahmadpur Naogawn, was sold to the present respon-

dents, (1) Lala Joti Prasad, (2), Lala Raghunath Singh and (3) Lala Beni Prasad sons of Lala Bansi Lal, under a sale deed, dated 3rd March 1911.

After selling the property in dispute to the respondents, Balwant Singh leased the property by a deed of lease, dated the 2nd August 1913, to Rana Dharam Singh, the father of Indar Singh, the judgment debtor No. 2. In 1914, Choudhri Balwant Singh filed a suit No. 61 of 1914 against the present decree holders, in which he assailed the sale deed, dated 3rd March 1911, in favour of the respondents on the ground of fraud, want of consideration, etc., and prayed that it be set aside. That suit was referred to arbitration on 17th September 1914, and when the award was filed in Court certain objections were taken to its validity but eventually a decree was passed on the award on 3rd February 1915 against Balwant Singh whose suit was dismissed on that date. In pursuance of the decree passed on the award the present respondents decree-holders deposited Rs. 65,000 in Court to be paid to Balwant Singh. Against this decree, Choudhri Balwant Singh filed an appeal in the High Court which was registered as first Appeal No. 121 of 1915. In the meantime the present respondents filed a suit No. 63 of 1915 in the Court of the Subordinate Judge of Saharanpur against Choudhri Balwant Singh in which they impleaded Rana Dharam Singh the lessee of the property in dispute, under the lease, dated 2nd August 1913. Subsequently, the name of Rana Indar Singh, his minor son, was added to the array of defendants under the guardianship of Mt. Sukhdevi the grandmother of Rana Indar Singh.

The reliefs claimed in the plaint were (a) that the lease, dated 2nd August 1913 be declared invalid and possession be delivered to the plaintiffs as against the defendants. Nos. 1 and 2, (b) that mesne profits be awarded against the defendants (c) that a sum of money by way of damages for the price of trees cut down by the defendants be awarded against them. Thus in addition to first Appeal No. 121 of 1915, *Choudhri Balwant Singh appellant v. Rai Bahadur Lala Joti Prasad* and others two other matters between the parties were pending in the High Court, viz., first Appeal No. 123 of 1915, Civil Revision No. 2 of 1917, and

as mentioned above the original Suit No. 63 of 1915 *Rai Bahadur Joti Prasad and others plaintiffs v. Choudhri Balwant Singh and Rana Indar Singh* defendants, was pending in the Court of the Subordinate Judge of Saharanpur. The respondents in this case and Choudhri Balwant Singh filed a compromise in the High Court by which they settled all their disputes. Two paragraphs of this compromise, which have a material bearing upon the present proceedings were these:

"1. That if Balwant Singh pay, on or before 19th September 1917, in the Court of the Subordinate Judge of Saharanpur for payment to Rai Joti Prasad and others aforesaid the following sums viz.

(a) Rupees 2,50,000 with simple interest thereon at the rate of 6 per cent per annum from 18th January 1915 up to the date of payment. (b) Rs. 65,000 with simple interest thereon at 6 per cent per annum from 17th March 1915 up to the date of payment. (c) The amount due under decree No. 51 of 1915 with interest as provided in the said decree up to the date of payment, the said Rai Bahadur Lala Joti Prasad, Lala Raghunath Singh and Lala Beni Prasad shall and do hereby abandon all claim and interest under the sale of March 1911 and their suit for possession of the Taluqa Naogaon shall stand dismissed, parties bearing their own costs throughout the litigation, and the Collector of Saharanpur as the receiver of the property shall deliver Naogaon to Choudhri Balwant Singh together with all profits in his hands. (2) That if the said Choudhri Balwant Singh does not pay into Court the amount aforesaid in terms of the preceding clause on or before 19th September 1917, his suit and first appeal No. 121 of 1915, first appeal from O. 123 and Civil Revision No. 2 of 1917 shall stand dismissed, both parties paying their own costs, and the original Suit No. 63 of 1915 shall stand decreed with costs and the Collector of Saharanpur, who is in possession of Naogaon as receiver appointed by the Court shall deliver possession of the said Taluqa together with profits thereof in his hands to Rai Bahadur Lala Joti Prasad and others plaintiffs in that case" It was further stated in the compromise that;

"This compromise is filed in the three cases pending in this Hon'ble Court and the parties will file a copy of this compromise in Suit No. 63 of 1915 within one week from this date, and apply to the said Court to decree the claim in accordance therewith."

It appears that a copy of this compromise was filed in the Court of the Subordinate Judge of Saharanpur in which the Suit No. 63 of 1915 was pending and the learned Subordinate Judge was requested to pass a decree in the suit in accordance with the terms of the compromise. No objection was raised on behalf of Balwant Singh but Rana Indar Singh objected that as he was not a party to the compromise, decree could not be passed as against him on the compromise and that as separate decrees could not be passed against the two defendants no decree should be passed even against Balwant Singh. The learned Subordinate Judge however overruled the objections of Indar Singh and passed a decree against Balwant Singh on the basis of the compromise on 22nd June 1917, ordering that a copy of the above-mentioned compromise be attached to the decree.

Subsequently a compromise was also effected between the plaintiffs Rai Bahadur Lala Joti Prasad, etc., and Rana Indar Singh, under the guardianship of Rani Shukhdevi, his grandmother, and under the terms of the compromise a decree was passed by the Additional Subordinate Judge of Saharanpur in the suit against defendant 2 also on 15th December 1917. Choudhri Balwant Singh did not deposit the amount which he was required to do, on or before 19th September 1917, under the compromise. The necessary result of which was that the suit of Balwant Singh No. 61 of 1914 stood dismissed, and Suit No. 63 of 1915 of the plaintiffs against Balwant Singh and Indar Singh stood decreed. Hence this application for execution of the two decrees passed in the Suit No. 63 of 1915 was made and the Court was asked to deliver possession to the plaintiffs, decree holders, over Taluka Naogawn. The judgment-debtor No. 1 objected to the execution of the decree on the grounds:

(1) that at the time of the execution of the sale-deed on the basis of which the decree under execution had been obtained the objector had merely a chance of succession after the death of Rani Dharamkuar which could not be trans-

ferred under the law and having regard to the provisions of S. 6 (a), T. P. Act, no right vested in the transferees under the sale. (2) That the transfer being contrary to law, the compromise between the parties and the subsequent decree passed on the compromise could not validate the transfer. (3) That the compromise ought not to have been accepted and a decree ought not to have been passed on its basis, under O. 23, R. 3, Civil P. C. (4) That as the compromise was not filed in Court within a week as provided by the compromise, a decree ought not to have been passed on it. On behalf of the decree-holders it was urged that the provision of S. 6 (a), T. P. Act was not applicable to the facts of this case. That the decree passed in the Suits Nos. 61 of 1914 and 63 of 1915 operate as res judicata.

That the judgment debtor, in his Suit No. 61 of 1914 himself, had accepted the award inspite of an objection by the decree-holders and that he had benefited under the award by receiving Rs. 65,000 under it and that he was now estopped from objecting to the award and the compromise. The learned Subordinate Judge of Saharanpur decided that the case of an adopted son, where the adoption was made by a widow on the condition that the adopted son would have no right during her life to the ownership or possession of the property, was distinguishable from the case of a mere Hindu reversioner who is to succeed after the death of a widow. In his opinion inspite of a condition postponing the rights of an adopted son, 'till after the death of the widow, the adopted son would have a vested interest in the property left by the deceased owner. In this view, apparently, he did not think it necessary to deal with the question of estoppel and res judicata raised in the pleadings. He was of opinion that the interest acquired by Balwant Singh, being of a higher character than the mere contingent reversionary interest of a collateral to succeed to property on the death of a Hindu widow, he was capable of dealing with it effectively, though the operation of the transfer made by him may be postponed till after the death of the widow. He based his judgment on the general principles of the Hindu law and disallowed the objections raised by the judgment debtor. Towards the end of

his judgment, there is an indication that he was also of opinion that the objection now raised by the judgment-debtor ought to have been raised by him at the time the compromise was filed and before a decree was passed on it. The pleas raised in the memorandum of appeal presented to this Court raise two main questions:

(1) Whether the transfer made by Balwant Singh was ineffective as being opposed to the provisions of S. 6 (a), T. P. Act? and (2) Whether the subsequent compromise effected in the Suits Nos. 61 of 1914 and 63 of 1915 had the effect of removing any defect existing in the sale? Only these questions were argued before us. In order to determine the first question we think it necessary first to examine the provisions of the deed of adoption together with those of the agreement executed by the natural father of Balwant Singh. In doing this we ought to keep in mind the general rules of the Hindu law, as applicable to an adoption. The adopted son on his adoption leaves his father's gotra and cannot take his estate nor does he offer pindas to him. As soon as the adoption is made, he is transferred to the family of the adoptive father. He stands exactly in the same position as if he had been born to his adoptive father. He divests the estate of any person in possession of the property of the adoptive father. If a widow happens to be in possession of the estate the result of the adoption is that her limited estate at once ceases. He becomes the full owner of the property and the widow's rights are reduced to a mere claim of maintenance. Such being the law, it lies upon the judgment-debtor to establish beyond doubt that the deed of adoption contained such valid conditions as to prevent the operation of the law. He will have in the first instance to show that there was an intention to prevent the vesting of the right to property in the adopted son and that intention was given effect to by some legal and valid provision in the deed of adoption. On a consideration of the terms of that deed we find that there is nothing in it which would prevent the vesting of the right in the adopted son. It is provided in the deed that the son would leave the family of his natural father and would live with his adoptive mother. He would be brought up under

her guardianship and would be supported and maintained according to his position and status *mortaba aur hasiyat ke muwfiq*. This would show that Balwant Singh was to be treated as an adopted son and his position and status was to be maintained as such. In this view the condition reserving to the widow the right of ownership and possession during her lifetime would simply mean that though Balwant Singh was to be the rightful owner as an adopted son the widow was to remain in possession during her life exercising all the powers of ownership as an ordinary Hindu widow. This construction to a large extent, derives support from the clear wordings of the agreement executed by Ramnawaz Singh, the natural father of Balwant Singh:

"*Tarikh imroza se pisr-i-mastur ka apne khandan se kuchh taluq nahin raha hai aur pisr mazkur ko woh haquq jo qanunan pisr-i-mutabanna ko hasil hote hain aj ki tarikh se kul jaidad wa matruka Raju Raghubir Singh Sahib marhum wa maqbuza junabah Rani Sahiba masufah men hasil honge, lekin yih shart mabain manmoqir aur junabah Rani Sabiba masufah hasab mansha wasiyat-o-ijazat Raja Raghubir Singh Sahib marhum qarar pai hai keh junabah Rani Sahiba masufah apni zindgi tak badastur malik aur qabiz kul reyasaat rahaingi.*"

viz.,

"From this date the son ceases to have any connexion with his natural family and that the said son will from today, acquire all the rights which an adopted son has under the law in all the property left (matrukah) by Raja Raghubir Singh deceased and which are in the possession of Rani Saheba. But it has been agreed between me and Rani Saheba that according to the wish and permission of Raja Raghubir Singh the Rani Saheba will continue to be malik aur qabiz (owner and in possession) of the entire Reyasaat during her life."

In this view of the construction of the deed of adoption it becomes unnecessary to consider the question whether it is lawful for a Hindu widow to make a conditional adoption so as to prevent the adopted son from taking possession of, and enjoying rights of ownership over, the property of the adoptive father during her life and whether such a condition creates an interest in favour of an adopted son, of the nature which is contemplated by Cl. (a), S. 6, T. P. Act.

It has been held in several cases that an agreement depriving an adopted son of his right to take possession of the property of the adoptive father is not prohibited by the law and such an agreement has been given effect to. See for example *Kali Das*

v. *Bijai Shankar* (1) and *Visalakshi Ammal v. Sivaramien* (2). But we have not been referred to any case in which it has been held that the interest of an adopted son under such a conditional adoption is exactly similar to the interest of a contingent collateral Hindu reversioner. The latter kind of interest has been held to be a mere chance of an heir apparent succeeding to an estate, and as such has been held to be non-transferable. Irrespective of the construction which we have put on the terms of the deed of adoption, we are of opinion that it has not been shown that the interest created in favour of Choudhri Balwant Singh under the conditional adoption in question was a mere possibility of succession to the Landhaura Estate after the death of Rani Dharamkuar. In our opinion both according to the interpretation of the deed of adoption and the law, a vested right was created in his favour, and merely his right of enjoyment and possession was postponed till after the death of the lady. Such being the case, we are of opinion that the transfer of Taluqa Naogawn in favour of the decree-holders under the sale-deed, dated 3rd March 1911, was unaffected by the provisions of S. 6 (a), T. P., Act.

We agree with the lower Court that on this finding alone the objections of the judgment-debtor were bound to fail, but we are also of opinion that the subsequent compromise and the decrees passed thereon left no room for any contention on the point. Rani Dharamkuar having died in November 1912, the property vested in Choudhri Balwant Singh. He was at the time a married man 29 years old and could deal with it as he liked. Under the compromise he entered into a new agreement, according to which the property sold was to vest in the decree-holders in the event of his failing to pay to them certain sums of money before 19th September 1917. The parties understood their positions fully and by a lawful agreement completed a binding contract. A decree was passed on the compromise which put an end to all disputes between the parties. It is too late now to try to go behind the compromise and the decree. It has however been argued on behalf of the appellant that if it was a mere expectancy that was transferred by the sale-deed in question it was open to him to impugn both the compro-

mise and the decree when possession was claimed in execution. In support of his contention the learned counsel for the appellant relied upon the case of *Ramasami Naik v. Ramasami Chetti* (3). That was a case relating to an impartible and inalienable zemindari. The nature of the interest which was transferred in that case by mortgage and the circumstances under which the consent decree had been obtained are stated at p. 261 (of 30 *Mad.*) of the report in these words:

"We now come to the most serious objection urged by the appellant. It is said that by the suit mortgage and the consent decree the 2nd to defendants 5 purport to transfer only their chance of succeeding to the zamindari, and that such a chance or mere possibility is incapable of transfer in India by virtue of S. 6 (a), T. P. Act. As pointed out by Muttusami Ayyar, J. [*Sivasubramania Naicker v. Krishnammal* (4)], in the case of this zamindari the interest to which each zamindar succeeds is his separate property and consists of his right to the income of the zemindari as beneficial owner for life. This is the interest which defendants 2 to 5 have sought to transfer by the mortgage and the consent decree. At the dates of mortgage and decree they had a mere chance of succeeding to this interest dependent in the case of each on his surviving all the male members of the family older than himself so as to make him for the time being the oldest member."

At the bottom of p. 262 (of 30 *Mad.*) the learned Judges who decided the case remarked:

"It is further urged that the defendants cannot go behind the decree. If however the mortgage did not operate as a transfer of interests of defendants 2 to 5, neither could the consent decree in the circumstances of the present case."

Now, what were the circumstances to which the learned Judges referred? The circumstances were these: The only interest which the defendants 2 to 5 in that case had, was a mere chance of succeeding to a life interest on the happening of a certain event as described at p. 261 (of 30 *Mad.*) above mentioned. In that case there can be no doubt that the interest transferred was of a kind contemplated by S. 6, Cl. (a), T. P. Act. The mortgage was made of such interest and at the time the consent decree was passed it was still a mere chance. In the present case irrespective of the nature of interest which Choudhri Balwant Singh possessed at the time of the sale-deed, he had a full and complete interest which had come into existence before the compromise and the consent decree. If the widow had been alive at the date of the consent decree, in

1. (1891) 13 All 391.

2. (1904) 27 Mad 577 (FB).

3. (1907) 20 Mad 255.

4. (1895) 18 Mad 287.

that case the ruling might have had a bearing on this question. No case has been cited having a direct bearing upon the facts of the present case. In our opinion it is not open to the judgment-debtor to go behind the compromise and consent decree in this case.

Over and above all that we have mentioned above there is the fact that what Choudhri Balwant Singh purported to transfer both by the deed of sale and the compromise was not a mere expectancy but the full right of ownership; even assuming that he had no vested interest at the date of sale he subsequently became the full owner and was such at the date of the compromise. He had received the sale consideration and the respondents had also paid a further sum of Rs. 65,000 and they are entitled to the estate which subsequently became vested in the minor after the death of the Rani. At the date of the sale Choudhri Balwant Singh claimed to be the full owner and was actually suing the Rani for possession and he purported to transfer the full right. We think that the decision of the Court below is right and the appeal should be and is hereby dismissed with cost.

V.B./R.K. *Appeal dismissed.*

*** A. I. R. 1918 Allahabad 121**

PIGGOTT AND WALSH, JJ.

F. B. Powell—Opposite Party—Appellant.

v.

S. Sen and others—Applicants—Respondents.

First Appeal No. 89 of 1916, Decided on 16th June 1917, from order of District Judge, Meerut, D/- 15th April 1916.

* (a) Companies Act (1913), S. 184—Person taking shares on stipulation that he would be made Director—If condition not fulfilled he does not become contributory on liquidation.

A person was induced by the Managing Director of a company to apply for a certain number of shares in the company on the understanding that he would be appointed a Director. The required number of shares were allotted to him but he was not appointed a Director, and the company went into liquidation;

Held: that the alleged share-holder was under no obligation to the company and could not be placed on the list of contributories, inasmuch as the condition on which he consented to become a share-holder had not been fulfilled. [P 124 C 1]

* (b) Companies Act (1913), S. 184—No complaint about delay in allotment of shares voluntarily purchased—On liquidation he

becomes contributory—Delay in allotment cannot be pleaded.

If a man binds himself by an unconditional contract to take shares in a company and there is delay in making the allotment, but it is eventually made and he says nothing about the delay, he must be taken to have consented to it, and if liquidation supervenes he cannot escape his liability by reason of the delay to which he raised no objection. [P 123 C 1]

(c) Companies Act (1913), S. 184—No reply to letter of allotment is required by law to be given.

A person is not called upon to reply to a letter of allotment or to repudiate it where no legal duty is imposed upon him to do so. [P 123 C 1, 2]

Sundar Lal and S. N. Sen—for Appellant.

Nihal Chand—for Respondents.

Judgment.—We think this is a clear case and that this appeal must be allowed. Mr. Powell is entitled to have his name removed from the list of contributors. The circumstances of the case are as follows:

Sometime in 1912 a company of the name of the Bharat Ice Association, Limited, began to carry on business in Meerut, where it may be supposed that under proper management it had a reasonable prospect of success. It appears to have been starved from the outset, and although it did a considerable amount of business in the way of obtaining shareholders and its books were kept with scrupulous care, it made no ice. Provisions were contained in the Articles of Association for the appointment of Directors. One only is important namely that with regard to what were called Terminal Directors, in other words Directors appointed for a specific period; and by Art. 177 (e) it was provided that the qualification for holding the post of a Terminal Director should be the holding of two hundred shares in the said Company. Mr. F. B. Powell, a zamindar of Saharanpur, against whom this application was made, had originally become a share-holder in the month of December 1912 to the extent of fifty shares. The Company was never in possession of sufficient working capital and in fact was never able to take delivery of the necessary machinery to carry on the business because it had not sufficient funds to pay, and it was indebted for a fairly substantial loan from the Standard Bank. Under these circumstances it was clearly necessary for the Company, if it was in future to carry on business, to raise further capital, and a resolution on 2nd February

1913 was passed by the Board for the purpose of increasing the capital. These circumstances are important if not vital, to a consideration of the question on which the question in this application really turns, because they throw considerable light on the probabilities of the conduct of both the main actors to this transaction.

The Managing Director was one Mr. Kapur, and we are satisfied, and the evidence is really conclusive on the point, that if he was not the sole person who did any business for the Company at this time, at any rate he was made by the Board of Directors, in express terms in one resolution and impliedly from all the facts of the case, their agent for obtaining any further capital in pursuance of the resolution of 2nd February 1913. He was expressly authorised to make such terms as he could for the extension of the credit of the Company, and it is quite clear that his position was such that the Company seeking to avail itself of any contract made in its interest by Mr. Kapur would be bound by the terms of such contract, so long as it was not ultra vires the memorandum and Articles of Association. He seems to have carried out his duties with industry. He secured a large number of new share-holders though for very small amounts, and substantially it may be said that the results of his efforts were of no real benefit to the Company in securing them sufficient funds to transact any serious business. It was therefore essential from the point of view of Mr. Kapur, who had done his best for the Company and in the interests of the Company, to secure, if he could, a substantial share-holder, and under these circumstances he selected Mr. F. B. Powell for the purpose and eventually, as the Judge has found and as the evidence of Mr. Kapur testifies, Mr. Powell agreed to take 150 additional shares on the understanding given by Mr. Kapur that the works of the Company would be removed to Saharanpur and that Mr. Powell should become a Terminal Director. There really can be no doubt as to the existence of this condition. Two features of the transaction have been pointed out in argument. In the first place, when Mr. Powell applied for 150 shares, he did not send the application money. That conduct at any rate was consistent with the transaction being in-

complete. He was already a share-holder to the extent of fifty shares and his application was for 150 shares more, which was exactly the qualification under Art. 177 (e) necessary for the appointment of a Terminal Director. It is uncertain when he paid his application money, or whether he ever paid it in full but he did pay Rs. 62 towards the Rs. 75 payable on his application of 17th March. His application was dealt with at a meeting of the Board and it was decided to allot him 150 shares, the numbers of which were given. On 17th March a resolution was passed, which is remarkable in its terms, viz., that:

"as a special case 150 shares which were specified by numbers should be allotted to Mr. Powell, if his application money is received in Rs. 75 only."

An allotment letter was sent to him calling upon him to pay a further sum of Rs. 75 on allotment, that is to say, in addition to Rs. 75 payable on application without which an allotment could never have been made at all, such amount due on allotment being payable under the altered Articles of the Company, and he was given ten days to pay the allotment money. One other fact may be stated, namely, that in the case of other share-holders who had applied unconditionally for small amounts which they wanted to take in the company, their names had been entered in the resolution allotting particular numbers to them without any condition at all. Nowhere was that done in the case of Mr. Powell's 150 shares. Mr. Powell never paid his allotment money. On the same day, namely, on 17th March the Directors at the Board Meeting resolved to call an extraordinary General Meeting for the election on Mr. Powell as Terminal Director of the Company, a circumstance which further corroborates the view which the Judge below and we ourselves take of the transaction. No further Board Meeting was ever held. The resolutions of 17th March were never confirmed. Mr. Powell was not appointed a director.

He did not pay his allotment money, and for all practical purposes the business of the company came to a stop at or about this date. At any rate shortly afterwards, viz., in the month of May, Mr. Kapur himself applied for the liquidation of the company, its substratum having practically gone. We are satisfied

tor, to taken any steps in the business of the company, nor indeed had he any title to do so. These cases are very often rather near the line and the learned counsel for the liquidator has argued his case with great thoroughness and ability, pointing out that there are many authorities in which the decision has been the other way. We think however that this is really a clear case. There does happen to be one authority which is remarkably like it, namely, the case of *London and Provincial Provident Association, In re, Mogridge's case* (1). That was a decision in favour of contributory by Stirling, J., a very experienced Judge in company law. There are two circumstances in the case which in our opinion make it a stronger case in favour of the liquidator than the present case, namely, (1) that the whole of the transactions were carried out on behalf of the company only by the Secretary, and (2) that it was quite clear that the proposed share-holder really wanted to get out of his bargain, because he had discovered that the company was in low water and it was a mere accident that the company sought to impose some additional terms on the original bargain. We think that the decision is a clear authority for this case according to English law and that in this respect the law in this country is not different.

The appeal must be allowed. Mr. Powell must have his costs in this Court and in the Court below, including fees in this Court on the higher scale, out of the estate. So far as the application of the liquidator to put Mr. Powell on the list of contributories is concerned, Mr. Powell's name must be struck off the list. Mr. Powell through his counsel has behaved very handsomely in withdrawing his claim with regard to Rs. 75, and therefore we have nothing to say about that. Mr. Powell's costs are not to include any costs of serving, as respondents to this appeal, share-holders other than the liquidator of the company, and the Standard Bank of India must pay its own costs. The liquidators of the Bharat Ice Association, Limited, and of the Standard Bank will pay their own costs out of the respective estates of the companies they represent.

V.B./R.K.

Appeal allowed.

1. (1898) 57 L J Ch 932.

A. I. R. 1918 Allahabad 124

BANERJI, J.

Ram Das and others—Accused.

v.

Emperor—Opposite Party.

Criminal Ref. No. 226 of 1918, Decided on 15th April 1918, made by Sess. Judge, Cawnpore.

U. P. Excise Act (1910), S. 44 (c)—Breach of condition of license by servant—Master cannot be convicted unless breach was with his knowledge.

A licence-holder cannot be convicted under S. 64, U. P. Excise Act in respect of a breach of the license committed by his servant, unless it is shown that he himself allowed the breach to be committed by his servant or was cognizant of what his servant was doing. [P 124 C 2]

Judgment.—The three accused in this case have been convicted under S. 64 (c), U. P. Excise Act, 4 of 1910. The first two accused are the holders of a license for the sale of liquor. The third accused Kallu is their salesman. One of the conditions of the license was that an account of sale made shall be kept in a prescribed form. The charge against the accused was that they had not kept correct accounts and that they had thus committed a breach of condition 9 of the license. S. 64 provides that whoever being the holder of a license or being in this employment of such holder and acting on his behalf, wilfully does or omits to do anything in breach of any of the conditions of the license, he shall be punished for each such offence with fine. As regards the first two accused, they would be guilty under the section if they wilfully did or omitted to do anything in breach of any of the conditions of their license. The use of the word "wilfully" clearly shows that it must be shown that they themselves allowed the breach to be committed by their servant or were cognizant of what their servant was doing.

The learned Sessions Judge, therefore was in my opinion, right in the view that these men could not be legally convicted under the section. The Magistrate who convicted them referred to the case of *Babu Lal v. Emperor* (1). That was a case under the Opium Act, the provisions of which were different from those of the Act in question in the present case. Reference was made in that judgment to the unreported case of *Queen-Empress v. Ram Kishen* (2) decided on

1. (1912) 34 All 319=14 I C 666=13 Cr L J 282.

2. Cr Ref No. 69 of 1890.

26th February 1890. That was a case under S. 42, Act 22 of 1881, the provisions of which were different from those of the present Act. The use of the word "wilfully" seems to me clearly to show that in the case of the accused it must be proved that they had intention or knowledge. As for Kallu who is said to have altered a page of the register, it seems that the original page, according to the finding of the Court below, did not contain an incorrect entry. I have considerable hesitation in agreeing with the learned Sessions Judge that the word "accounts" does not mean correct and proper accounts but even on that construction it can hardly be held, in view of the lower Court's finding, that the accounts were not correctly kept. Under these circumstances the conviction of the three accused was not justified. I accordingly set aside the conviction and sentence and direct that the fine, if paid, be refunded.

V.B./R.K. *Conviction set aside.*

A. I. R. 1918 Allahabad 125

PIGGOTT, J.

Raja Ram Singh—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 172 of 1918, Decided on 4th May 1918, from order of Sess. Judge, Azamgarh.

(a) Penal Code (1860), S. 500 — Using obscene and insulting language is offence under S. 500.

After an altercation between the parties was over, the accused addressing third persons used language of an obscene and insulting nature in respect of the complainant, a respectable Mukhtar:

Held: that the words were calculated to harm the reputation of the complainant and that the accused was therefore guilty of an offence under S. 500. [P 120 C 2]

(b) Penal Code (1860), S. 500—Utterance of prima facie defamatory words used in street quarrel does not necessarily suggest intention to harm reputation. (*Obiter.*)

There is some authority for the proposition that words prima facie defamatory used in a street quarrel should be regarded as mere vulgar abuse and that their utterance under such circumstances does not necessarily suggest an intention to harm the reputation of the person to whom they are applied. (*Obiter*) [P 125 C 2]

Pearylal Banerji—for Applicant.

R. Malcomson—for the Crown.

Judgment.—This is an application in revision by one Raja Ram Singh, who has been convicted on a charge under S. 500, I. P. C., and sentenced to a fine of Rupees

50, the case against him being that he used language of an obscene and insulting nature in speaking of a respectable Mukhtar of the name of Muhammad Ali Khan. I do not propose to go into the unedifying details of the quarrel between these two gentlemen. The trying Magistrate has gone into the evidence very thoroughly and has written a carefully considered judgment. I accept his finding as to the words used by Raja Ram Singh and the circumstances under which they were spoken. The point taken on behalf of the applicant is that the words used were obviously not intended to be understood literally and amounted to no more than an open expression of the fact that the accused was very angry with the complainant. There is some authority for the proposition that words prima facie defamatory used in a street quarrel should be regarded as mere vulgar abuse and that their utterance under such circumstances does not necessarily suggest an intention to harm the reputation of the person to whom they are applied. I am content to refer to the case of *Empress v. Behari* (1). I think the present case distinguishable; the words in respect of which Raja Ram Singh has been convicted were not used in the course of a quarrel; they were not addressed to Muhammad Ali Khan at all, but were spoken of him after the altercation between the parties was over. Assuming in the applicants favour that he did not intend that his hearers should take literally the disgusting imputation conveyed by his words, I do not see that he is in any better position than he would have been if he said:

"I wish to convey to you in the most emphatic language at my command, that I consider Muhammad Ali Khan a worthless and despicable blackguard."

Surely the Sub Inspector would not wish me to hold that his own credit and reputation amongst his acquaintances stands so low that he has himself no "reason to believe" that such an expression of opinion on his part would harm the reputation of the person of whom it was made. I hold that Raja Ram Singh was rightly convicted on the facts found and I dismiss his application.

V.B./R.K. *Application dismissed.*

1. (1893) A W N 86.

A. I. R. 1918 Allahabad 126 (1)

KNOX, J.

Hait Ram—Applicant,

v.

Ganga Sahai and others — Opposite Parties.

Criminal Ref. No. 135 of 1918, Decided on 6th May 1918, made by Addl. Sub-Judge, Aligarh.

(a) Criminal P. C. (5 of 1898), Ss. 250, 209 and 253—Offence triable by Court of Session—Inquiry by Magistrate under Ch. 18—Discharge of accused under S. 209—Compensation cannot be awarded to accused.

All that a First Class Magistrate has jurisdiction to do in the case of a charge of an offence triable by the Court of Session is to follow the procedure laid down by Chapter 18, Criminal P. C. In that chapter neither S. 250 nor S. 253 finds any place. Therefore, the Magistrate has no power to award compensation to the accused when discharging them under S. 209.

[P 126 C 1,2]

(b) Criminal P. C. (1898), S. 209—Magistrate is not authorised to write judgment but to record reasons for order of discharge.

Under S. 209 a Magistrate is not authorised to write a judgment in a case triable by a Court of Session; all that he is empowered to do is to record reasons for a discharge, if he make such an order, and to pass the order of discharge.

[P 126 C 2]

C. J. A. Hoskins—for Applicant.*Nehal Chand*—for Opposite Parties.

Judgment.—This a reference made by the Second Additional Sessions Judge of Aligarh. He sends us an order passed by a First Class Magistrate of Etah, ordering the discharge of several persons accused before him and directing the complainant to pay compensation to the accused persons. The order directing payment of compensation is undoubtedly to my mind illegal and must be set aside. The offence with which the accused were charged was really an offence under S. 494, I. P. C., Ss. 363 and 420, I. P. C. which were added as sections under which the accused were alleged to be guilty, were mere appendages to the original section. The Magistrate had no jurisdiction to try the offence under S. 494, I. P. C. Ss. 250 and 253, Criminal P. C. are to be found, one in a chapter which deals with the trial of summons cases by Magistrate, and the other in a chapter dealing with the trial of warrant cases by Magistrates. This was neither a summons nor a warrant case. All that the First Class Magistrate had jurisdiction to do in a case of a charge of an offence under S. 494, I. P. C. was to follow the procedure laid down by Chapter 18,

Criminal P. C. In that chapter neither S. 250, nor S. 253 finds any place. The order directing payment of compensation is set aside and the compensation or such part of it as may have been paid will be at once refunded.

In going into the case, however, a more important question arises, and that is whether the Magistrate, Babu Brij Nath Ugra, was justified in discharging the accused. I hold that he was not. He has evidently misconceived the purpose and the intention of S. 209, Criminal P. C. He has written a judgment in the case. Now if the learned Magistrate will look at S. 209, he will find that he is not authorised to write a judgment in a case triable by a Court of Session; all that he is empowered to do is to record reasons for a discharge, if he make such an order, and to pass the order of discharge. This Court has gone into the matter at considerable length in the case of *Fattu v. Fattu* (1). The learned Magistrate has done exactly what this Court in the case cited above condemned. He has criticised the evidence given with painful minuteness. He has found it entirely unreliable and worthless and he has written a paragraph saying that he is dealing with the complainant for making a malicious complaint without any foundation to harass the accused. The case has to be thoroughly enquired into. A thorough and complete enquiry has not been made. I set aside the order of discharge and I return the case to the District Magistrate of Etah who will direct Babu Brij Nath Ugra, if he is still there, or some other Magistrate competent to hold inquiry to take any further evidence that may be offered to examine the accused, and to commit them to the Court of Session for trial.

V.B./R.K.

Order set aside.

1 (1904) 26 All. 564=1 Cr L J 510.

A. I. R. 1918 Allahabad 126 (2)

PIGGOTT AND WALSH, JJ.

L. W. Orde—Plaintiff—Appellant.

v.

Secretary of State—Defendant—Respondent.

First Appeal No. 349 of 1915, Decided on 29th January 1918, from order of Dist. Judge, Meerut.

Land Acquisition Act (1894), Ss. 23 and 49—Compound appurtenant to house under cultivation of occupancy tenants acquired—

Compensation assessed on basis of 16 years purchase of annual profits—Method of assessment is correct.

A compound appurtenant to a house but in cultivating possession of occupancy tenants was acquired under the Act and compensation was assessed on the basis of 16 years' purchase of the annual profits then derived by the owner from the land. The owner objected that compensation should have been assessed according to the market value of the land considered as a building site:

Held: that the method of assessment was correct as the land in suit was not at the disposal of the owner for sale as building site inasmuch as any one desiring to acquire it for that purpose would have to deal not only with the owner but also with the occupancy tenants having vested rights not transferable except under stringent limitations laid down by the Tenancy Act.

(P 127 C 2; P 128 C 1)

Sital Prasad Ghose—for Appellant.

A. E. Ryves—for Respondent.

Judgment.—This is an appeal in a land acquisition case. The plot of land in question is situated at Meerut and is required by Government for the purpose of a boarding house in connection with an important school. The owner objected to the District Judge against the sum awarded by the Collector but his objections failed and he has appealed to this Court against the order of the District Judge. The memorandum of appeal before us raises three points: two of which may be briefly disposed of. The plot of land in suit forms part of a compound appurtenant to a house owned by the appellant and the point as taken in the memorandum of appeal before us is that the District Judge has erred in refusing to enforce in favour of the appellant the provisions of S. 49, Land Acquisition Act (No. 1 of 1894), according to which the appellant was entitled to claim that the entire compound should be acquired. As a matter of fact the point has not been argued before us precisely in this form. It has rather been contended that the provisions of S. 23, Cl. (1) (thirdly), have been overlooked by the Court below and that the compensation awarded should have been increased upon an estimate of the damage presumably sustained by the appellant in consequence of the severance of this parcel of land from the rest of the compound. If we thought that injustice had been done to the appellant in the Court below merely because he had failed to make it sufficiently clear by his pleadings whether he was desiring to claim his remedy under S. 49 or under S. 23 aforesaid we should not have felt that there was any

technical objection in the way of our doing substantial justice. We find that this point has been considered in all its bearings and has been disposed of by the learned District Judge. The fact is that although the land in suit may be spoken of in a sense as forming part of the compound of a house the area in question has not been kept up as a compound.

Both the plot of land in suit and the adjoining area have been brought under cultivation and occupancy tenants are in cultivating possession of the same. Under these circumstances it does not appear that any case is made out for a claim for enhanced compensation on the ground of damage from severance. The third plea on appeal is as to the alleged under valuation of the well situated on the plot of land in suit. It is sufficient to say about this that the learned District Judge was right in remarking that on the materials available on this record, there was no case made out for increasing the sum awarded by the Collector under this head. There remains the more substantial plea taken in para 2 of the memorandum of appeal. It is contended that the land in question although at present under cultivation and held by occupancy tenants has a value as a building site which has been entirely disregarded by the Court below. We have been referred to the case of *Bombay Improvement Trust v. Jalbhoy Ardesir Sett* (1), where the principles applicable to the acquisition of land in respect of which there exists more than one interest have been discussed and laid down. We do not see that these principles have been overlooked by the Court below. The learned District Judge has taken into consideration what the market value of this land might be, if it were vacant and available for building purposes. He has estimated its value from this point of view at Rs. 500 a bigha. The memorandum of appeal before us seems to accept this valuation as more or less adequate from the point of view on which it proceeds. In argument our attention has been drawn to portions of the evidence from which it might be inferred that even this sum of Rs. 500 a bigha was an under-valuation but on the evidence as a whole there seems no reason why it should not be accepted as far as it goes. As the learned District Judge,

however points out the difficulty of this case lies in the fact that the land in suit was not at the disposal of the appellant for sale as a building site. Any one desiring to acquire it for that purpose would have to deal not merely with the appellant, but with the occupancy tenants who have vested rights not transferable except under stringent limitations as laid down in the Tenancy Act. Taking this matter into consideration the learned District Judge has come to the conclusion that the value of this land to the appellant himself does not exceed the sum which has been allowed by the Collector calculated on the basis of so many years' purchase of the annual profits actually derived by him from it at the present time. We have been asked to consider what has been actually paid by Government under the orders of the Collector to the occupancy tenants for the purchase of their rights; but the occupancy tenants accepted the Collector's valuation and their case was not before the Court below. Had the occupancy tenants given evidence in the present case and established the fact that they would have been prepared at any time to surrender their rights to their proprietor for the time being in return for the sum which was awarded to them as compensation by the Collector there might have been some basis for the contention that the award in favour of the present appellant should be increased by the difference between the market value of the land as a building site calculated at the presumed rate of Rs. 500 a bigha and the sum total of the compensation awarded by the Collector to the appellant and to the occupancy tenants. There is however no such evidence or the record and the mere acquiescence by the occupancy tenants in the Collector's award by no means suggests as a necessary inference the fact that they would not have stood out for a higher price if they had found themselves bargaining with a proposed purchaser of the proprietary rights. It seems, therefore that no cause has been shown for interference with the order of the Court below. We dismiss the appeal with costs.

V.B./R.K.

Appeal dismissed.

A. I. R. 1918 Allahabad 128 Special Bench

KNOX, AG C. J., TUDBALL AND
RAFIQUE, JJ.

Mohamad Faiyaz Ali Khan—Plaintiff
—Appellant.

v.

Behari and another—Defendants—Respondents.

Second Appeal No 357 of 1916, Decided on 17th July 1917, from decree of 1st Addl. Judge, Aligarh, D/- 1st December 1915.

Wajib-ul-arz—Entry in—Payment of parjote held based on agreement and not custom—parjote can be recovered by suit.

The wajib-ul-arz of a village recorded that every shopkeeper in the village was liable to pay parjote at a certain rate:

Held: that the entry pointed to the fact that the payment was based on agreement and not on custom and that being rent payable in kind under the terms of the wajib-ul-arz it could be recovered by suit. [P 129 C 1]

Iqbal Ahmad—for Appellant.

Panna Lal—for Respondents.

Judgment.—This appeal arises out of a suit brought by Nawab Mumtaz-ud-daula Faiyaz Ali Khan, who in his plaint sets himself out as, and who is further admitted to be, the sole zamindar of the village to which this appeal relates. The respondents are in the plaint described as the village Banias and as being shopkeepers in the said village. The plaintiff is claiming 12 maunds of cotton seeds or the value thereof. It is true that in the plaint the plaintiff set out that there was a custom of such payment in the village. This amount of the seeds is payable for each shop occupied by the Banias in the Bazar. But in the written statement, which was filed, we note that the respondents themselves alleged that at the most the entry in the wajib-ul-arz amounts to an agreement between themselves and the plaintiff, the terms of which expired at the end of the former Settlement of 1866. As the case went on, it is evident that the Courts below tried the question between the plaintiff and the defendants as a question of parjote. The Court of first instance held that the payment of this parjote was a custom proved. He says that it is parjote or ground-rent and not a cess and cannot be called illegal and the wajib-ul-arz of 1866 is a good evidence of the custom set up by the plaintiff but the Court went on to hold that the custom had fallen into desuetude and dismissed the claim of the plaintiff. The

plaintiff went in appeal to the District Judge of Aligarh. That Court took a different view from the Court of the first instance and held that the custom to take ground-rent had not been proved. It therefore dismissed the appeal.

The plaintiff comes here in second appeal and the first plea taken by him is that the entry in the *wajib-ul-arz* is a record of custom and proves the custom set up by the plaintiff-appellant, and a further plea is taken that in any case the plaintiff-appellant is entitled to get a reasonable rent of the land in the possession of the defendants-respondents. We are of opinion that the word custom throughout has been wrongly used. In case of an agreement between the plaintiff and the defendants it can never be said for a moment that the rent they paid was rent payable by force of custom. The word used in the *wajib-ul-arz* is *parjote* and points to the fact that if the payment of anything from the respondents to the appellant was due, it was a matter based upon some agreement in the first instance. At first sight the way in which this payment was to be made may strike one as somewhat strange, but it is not so strange as to be impossible. The definition of rent sanctions the view that rent may be something paid in cash and also something paid in kind. When this is borne in mind, we are of opinion that the lower appellate Court has approached the evidence it had to consider from a wrong point of view. There is on the record the *wajib-ul-arz* of 1870. We had that *wajib-ul-arz* read to us and we see nothing in the language which will justify the inference that the matters recorded in para 2* were unlikely or improbable.

We look upon that paper as a statement made fifty years ago, more or less, by a person who was qualified and had the knowledge necessary to make it. It is not a statement narrating a tradition, but it is a statement by a person possessing an interest and an existing right in the village. It is extremely improbable that the person was making a statement to perpetrate a fraud or was making a statement which was false to be used fifty

**Reyaya bashinda deh se kiraya nahin liya jata hai Aur babat parjote . . bashindgan deh se batafsil zael liya jata hai: Babat parjote sal tamam; baqqalan bazar fi dukan binuala ek man; . . .*

1918 A/17 & 18

years afterwards. There was nothing to rebut that statement and we hold that the payment of *parjote* by the respondents to the appellant is proved thereby. We accordingly set aside the decrees of both the Courts below and decree the plaintiff's claim with costs in all Courts and future interest at the usual rate

V.B./R.K.

Appeal decreed.

A. I. R. 1918 Allahabad 129

KNOX, J.

Emperor.

v.

Khushali Ram—Opposite Party.

Criminal Ref. No. 872 of 1917, Decided on 19th November 1917, made by Sessions Judge, Agra, D/- 15th October 1917.

(a) Criminal P. C. (5 of 1898), Ss. 195 and 476—Words 'referred to in S. 195' are descriptive of offences mentioned in S. 195—S. 195 does not control S. 476.

The words "referred to in S. 195," which have found a place in S. 476, Criminal P. C., are merely words descriptive of the class of offences with which a Court can deal. They do not mean that S. 195 governs S. 476 in any other respect. [P 130 C 1]

(b) Criminal P. C. (5 of 1898), S. 476—S. 476 applies to both offence committed before Court or brought to its notice.

Section 476, Criminal P. C., contemplates not merely offences committed before a Court but also offences brought under the notice of a Court in the course of a judicial proceeding. [P 130 C 1]

(c) Criminal P. C. (5 of 1898), Ss. 476 and 478—Munsif at Agra cannot take action under S. 476 in respect of offences under Ss. 476, 471, 193, 209 and 210, I. P. C. committed in Bengal but brought to his notice.

Wherefore offences under Ss. 467, 471, 193, 209 and 210, Penal Code committed in Bengal were brought to the notice of a Munsif in Agra in the course of a judicial proceeding:

Held: that the Munsif had jurisdiction to proceed under S. 478, Criminal P. C., and commit the accused for trial before the Agra Court of Session. [P 130 C 1]

A. E. Ryves—for the Crown.

Judgment.—I have read the order of the Sessions Judge of Agra, dated 15th October 1917. That order sets out that the Munsif of Fatehabad in the Agra District was of opinion that there was ground for enquiring into offences supposed to have been committed under Ss. 467, 471, 193, 209 and 210, I. P. C. The offence under S. 467 was alleged to have been committed at Sirai Gunj in Bengal and the same remark applies to the other offences. The accused was committed for trial to the Court of Session at Agra, the Court to which the Munsif of Fatehabad could commit the accused

person. The accused pleaded that the Court of the Sessions Judge of Agra had no jurisdiction to try the case. The latter Court, acting under the provisions of S. 185, Criminal P. C., has asked this Court to decide whether the offence shall be tried by that Court or by some Court having jurisdiction in the Province of Bengal. The learned counsel who appears for Khushali Ram in this Court contends that the offence was committed within the Province of Bengal and that as it is an offence referred to in S. 195, Criminal P. C., it cannot be enquired into except with the previous sanction or on the complaint of the Court before which the offence was committed in Bengal or of some other Court to which such Court is subordinate. I am unable to accede to this contention.

Section 476, Criminal P. C., contemplates not merely offences committed before the Munsif of Fatehabad but also offences brought under the notice of the Munsif in the course of a judicial proceeding. This was a judicial proceeding before the Court of the Munsif of Fatehabad and the offences were brought to the notice of the Munsif in the course of that proceeding. Ordinarily the Munsif would have under S. 476 to send the case under such circumstances for inquiry or trial to the nearest Magistrate of the first class. He certainly would have no jurisdiction to send the case for inquiry or trial to any Court within the Province of Bengal and under S. 478 he had jurisdiction to commit the accused to take his trial before the Court of Session, obviously the Court of the Sessions Judge of Agra. The words "referred to in S. 195," which found a place in S. 476, Criminal P. C., are merely words descriptive of the class of offences with which the Munsif can deal. They do not mean that S. 195 govern S. 476 to any extent other than that just mentioned. Let the record be returned to the Sessions Judge of Agra, who will proceed to deal with the case according to law.

V.B./R.K.

*Record returned.***A. I. R. 1918 Allahabad 130**

RICHARDS, C. J. AND BANERJI, J.

Bhagwan—Accused.

v.

Emperor—Opposite Party.

Criminal Appeal No. 110 of 1918, Decided on 3rd April 1918.

Penal Code (1860), Ss. 457 and 380—Accused member of criminal tribe walking into house and stealing articles—Accused caught before getting away is not guilty under S. 457 as to be liable to enhanced punishment under U. P. Criminal Tribes Act (1911), S. 23.

Accused, who was a member of a criminal tribe and had been twice previously convicted of dacoity finding the door of a house open, walked in and proceeded to steal certain articles therefrom. He removed some of the articles preparatory to taking them away, but before he actually got away the alarm was given and he was caught:

Held: that the accused was not guilty of lurking house-trespass under S. 457 so as to be liable to enhanced punishment under S. 23, Criminal Tribes Act. [P 131 C 1]

S. N. Sinha—for Accused.

R. Malcomson—for the Crown.

Judgment.—The accused has been convicted under S. 457, I. P. C., read with S. 23, Criminal Tribes Act: The accused beyond all question belongs to a criminal tribe. He has been twice previously convicted of dacoity. From the evidence on the record there can be no doubt that the accused in the present case entered a dwelling-house and proceeded to steal clothes and utensils belonging to certain students. He removed some of the articles preparatory to taking them away, but before he actually got away the alarm was given and he was caught. The learned Sessions Judge was of opinion that under S. 23, Criminal Tribes Act he had no option except to sentence the accused to transportation for life. Mr. Sinha on behalf of the accused argues that on the facts proved the accused was not guilty of an offence punishable under S. 457. He contends that on the assumption that the accused is guilty at all, he is only guilty under S. 380. S. 380 is not one of the sections referred to in S. 23, of the schedule attached to the Criminal Tribes Act. S. 457 provides that whoever commits "lurking house-trespass by night" or "house-breaking by night," has committed an offence under section.

Lurking house-trespass is committed when a person enters premises of the nature described in S. 442 having taken precautions to conceal such house-trespass in the manner mentioned in S. 443. There does not appear to be any evidence that the accused in the present case took any such precautions. The evidence is that he was found by one of the students

who was awakened by the noise in removing the articles. House-breaking is defined by S. 445. There does not appear to be any evidence that the accused effected his entrance into the house in any of the six ways mentioned in the section. On the other hand it is quite consistent with the evidence that he found the door open, walked into the house, went upstairs to where the students were sleeping, and commenced to steal. We think under these circumstances the accused could not be properly convicted under S. 457, and that his conviction ought to have been under S. 380 and therefore the Sessions Judge was not bound to sentence the accused to transportation for life. The accused is evidently a dangerous man. We have already mentioned that he has been twice previously convicted for dacoity. We alter the conviction from a conviction under S. 457 read with S. 23, Criminal Tribes Act to conviction under S. 380 read with S. 75 and we reduce the sentence from a sentence of transportation for life to a sentence of ten years' rigorous imprisonment with effect from the date of his original conviction.

V.B./R.K. *Conviction altered.*

A. I. R. 1918 Allahabad 131
Full Bench

BANERJI, PIGGOTT AND WALSH JJ.
Bharat Singh—Plaintiff—Appellant.

v.

Tej Singh and another—Defendants—Respondents.

Second Appeal No. 795 of 1916, Decided on 11th December 1917, from decree of First Addl. Judge, Aligarh, D/- 17th February 1916.

Agra Tenancy Act (1901), S. 164—Suit to recover share of profits from lambardar—Death of lambardar—Legal representative is also liable for profits remaining uncollected due to neglect of lambardar—Liability is limited to assets of deceased in hands of legal representative.

Where in a suit for a share of the profits by a cosharer against a lambardar under S. 164, the lambardar dies during the pendency of the suit and his heir is brought on the record as his legal representative, the latter is liable not only for the collections actually made by the lambardar but also for the profits which remained uncollected owing to the neglect or misconduct of the lambardar, but this liability is limited to the extent of the assets of the deceased which have come to his hands. [P 132 O 2]

Surendra Nath Sen—for Appellant.

Pyare Lal Banerjee—for Respondents.

Banerji, J.—This appeal arises out of a suit brought for the recovery of the share of profits of a cosharer for the year 1318 Fasli. The plaintiff is the assignee of the profits from the cosharer, who is defendant 2 in the suit. The suit was brought against Kundan Singh, who was the lambardar in the year in question. The plaintiff claimed a share not only of the profits actually realized but also of the profits which, according to him, had not been realized by the lambardar through gross negligence and misconduct. During the pendency of the suit the lambardar died and his legal representative, Tej Singh, was brought upon the record. He contended that he was not liable for amounts which his predecessor-in-title, namely Kundan Singh, had neglected to collect. The Court of first instance repelled this contention and made a decree for what it held to be the total amount shown in the rent roll and other sums which had not been shown in the rent roll but which the lambardar must be taken to have realized. Upon appeal by the defendant, the legal representative of the lambardar, the lower appellate Court dismissed the suit, holding that the representative of the lambardar could not be held liable for amounts which the lambardar had through misconduct and negligence not collected, and as the amount actually collected fell short of the Government revenue and cesses paid by him, the plaintiff was not entitled to recover anything from the defendant. From this decision of the learned Judge of the lower appellate Court the present appeal has been filed. The question we have to determine is whether in the circumstances of the present case, the contention of the defendant is a valid contention. It seems to me that the decision of the case turns upon the construction of S. 164, Agra Tenancy Act under which the suit was brought. That section provides that

"a cosharer may sue the lambardar for his share of the profits of a mahal or of any part thereof. In any such suit the Court may award to the plaintiff not only a share of the profits actually collected but also of such sums as the plaintiff may prove to have remained uncollected owing to the negligence or misconduct of the defendant."

What we have to consider is, what is the scope of this section. The test for answering the question raised is whether by the word "defendant" the legislature meant the original defendant to the suit or the person who was in the array of

defendants at the time the decree was passed. By S. 166-A "lambardar" includes the heirs, legal representatives, executors, administrators and assigns of a lambardar. The present suit was not brought against a representative of the lambardar but against the lambardar himself. Sub-S. 2 seems to me to refer to the case of a person who was sued as the original lambardar, and in that view the misconduct or negligence which would entitle the plaintiff to recover a share of the amount which remained uncollected would be the misconduct or negligence of the defendant who was sued, namely (as in the present case) the original lambardar. If the person who was sued was the representative of the lambardar, he would be the defendant in the suit and he would not be liable according to the language of the section, as the misconduct or negligence could not be his misconduct or negligence. However we are not called upon to decide that question in this case. In the present case, the original lambardar who made the collections in the year in question, was sued and it was after his death that his representative was brought upon the record. The word "defendant" in sub-S. (2), S. 164 contemplates, in my opinion, the original defendant to the suit and therefore the amount to which the plaintiff would be entitled would include such sums as remained uncollected owing to the negligence or misconduct of the original defendant, that is, of the lambardar. This may create an anomaly, but we have to construe the section as it stands.

The case of *Muradunaissa v. Ghulam Sajjad* (1), to which reference was made, was a case under Act 12 of 1881. S. 209 of that Act provided that in a suit brought against a lambardar for a share of profits, the plaintiff would be entitled to a sum equal to the plaintiff's share in the profits which through gross negligence or misconduct the lambardar had omitted to collect. That was a suit in which the heir of the lambardar was subsequently brought upon the record on the death of the lambardar. Having regard to the provisions of S. 209, the liability of the lambardar would be for amounts which he had not collected. The word "lambardar" in Act 12 of 1881 did not include the legal representative of a lambardar and therefore having regard to

the fact that the word "lambardar" was used in that section, the heir of the lambardar could not be held liable. That case therefore does not seem to have any bearing upon the question we have to decide with reference to the language used in S. 164 and the addition of S. 166 to the present Tenancy Act. The case of *Dip Singh v. Ram Charan* (2) was a suit against the heir of a deceased lambardar and was brought under the present Tenancy Act. In that case it was held that having regard to the use of the word "defendant" in the section the heir, who was the defendant, could not be held liable, as negligence or misconduct referred to in the section was not his negligence or misconduct. That case therefore does not help us in the decision of the present suit. In my opinion in view of the provisions of S. 164, the question of gross negligence or misconduct of the original lambardar against whom a suit was brought, would have to be gone into and if such negligence or misconduct was shown his representative would be liable to the extent of the assets of the deceased which came into his hands. In any case the liability of the representative of the lambardar would not be a personal liability. On principle it does not seem that the assets of the deceased lambardar should escape liability, simply because the said lambardar who had neglected to make collections or was guilty of gross misconduct happened to die after the expiry of the year during which the collections had to be made. In my opinion no question of tort or of quasi contract arises under the circumstances mentioned above. The case, as I have already said, depends upon the construction of S. 164 and I would construe the section in the manner I have stated above. In my opinion the decision of the lower appellate Court ought to be reversed and the case remanded to that Court.

Piggott, J.—I concur both in the proposed order and in the reasons given for the same. I only wish to refer to the provisions of O. 22, R. 4, Civil P. C., as further strengthening the position taken up. When the suit was instituted the original defendant Kundan Singh was under a liability to the plaintiffs by reason of the provisions of Cl. (2), S. 164, Tenancy Act. On his death his son Tej Singh was brought on the record as his

legal representative. It was then open to Tej Singh to make any defence appropriate to his character as a legal representative to Kundan Singh deceased. If Tej Singh had been sued as an original defendant after the death of his father it would no doubt, have been open to him to say that under the Statute the negligence or misconduct on which a certain liability was imposed must be that of the defendant in the suit, and that he himself could not be held liable for any negligence or misconduct on the part of his father: but such a defence is in my opinion, inappropriate to the character of Tej Singh as legal representative of a deceased defendant brought upon the record under O. 22, R. 4, Civil P. C. This was a case in which it could not be pleaded that the right to sue did not survive, within the meaning of the rule in question; and if the right to sue survives it must do so against the legal representative of a deceased defendant in the same manner as against that defendant himself. In my opinion on the wording of Ss. 164 and 166, Tenancy Act, the plaintiff's claim based upon Cl. 2, S. 164, was maintainable against the legal representative of Kundan Singh after the death of Kundan Singh.

Walsh, J.—I entirely agree. I only want to add one word to prevent it being supposed that there is anything in my original order of reference in this case suggesting dissent from the decision in *Dib Singh v Ram Charan* (2). On the contrary I agree with that decision, it being impossible to hold that in a suit against the representative of the deceased lambardar the defendant should be held responsible in that suit for the negligence or misconduct of somebody else, and that is what I understand 29 Allahabad decided. The difficulty arises from the head note. What we decide in this case is inconsistent with the head-note of 29 Allahabad if you separate it from the context, but as I said in my order of reference, that case was deciding a totally different point which really does not bear on the case before us. The trouble unfortunately frequently arises owing to judgment being reported without a clear statement of the facts which give rise to the decision, and even at this moment on a closer examination of the decision in *Gulab v. Fateh Chand* (3), to which I made reference, in my order of reference,

3. (1886) A W N 82.

it is impossible to say whether the suit was brought against the heirs after the death of the lambardar or whether they had been made defendants originally. It would appear to have been brought after the death of the lambardar, but that is a matter of inference and is not stated anywhere. I agree in the order proposed.

By the Court.—The order of the Court is that the appeal is allowed, the decree of the Court below is set aside and the case is remanded to that Court with directions to re-admit it under its original number in the register, and to try and determine the other questions which arise in the case. Costs here and hitherto will be costs in the cause.

V.B./R.K.

Appeal allowed.

A. I. R. 1918 Allahabad 133

TUDBALL, J.

Ishwar Prasad—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 898 of 1917, Decided on 8th March 1918, from order of Dist. Magistrate, Allahabad.

Criminal P. C. (1898), S. 423, Cl. (b)—Necessary evidence not brought upon record by lower Court—Nothing more should be done than to have the evidence taken and brought on record.

Where the only defect in the procedure of the Court of first instance is that certain evidence has not been brought upon the record which ought to have been there, it is quite unnecessary to do anything more than to have that evidence taken and brought upon the record. It is unnecessary to worry all the witnesses a second time and to waste public time in having them re-examined. [P 134 C 1]

Satya Chandra Mukerjee—for Applicant.

R. Malcomson—for the Crown.

Judgment.—In this case Ishwar Prasad has been convicted of an offence under S. 411, I. P. C. and has been sentenced to a fine of Rs. 100 by a Magistrate of the Second Class. He appealed against his conviction to the District Magistrate who has directed the case to be re-tried in another Court in accordance with law. It is within the Magistrate's power to direct a re-trial under S. 423, Cl. (b), Criminal P. C. The grounds given by the District Magistrate for ordering a re-trial are as follows; He says

"that from its appearance the case would seem to have been hurriedly tried and one in which the evidence is deficient. In particular it is not clear why the evidence of the ekkawala who was

present at the search, was not taken as he is one of the main witnesses whose evidence is intended by law to be of importance in a case of this type. The procedure adopted is open to criticism. It is necessary that the case should be re-tried."

If the only defect in the procedure of the Court of first instance is that certain evidence had not been brought upon the record which ought to have been there, then it seems to me it is quite unnecessary to do any more than to have that evidence taken and brought upon the record. It would be unnecessary to worry all the witnesses a second time and to waste public time in having them re-examined. It is not clear except for the above in what way the procedure of the first Court is open to criticism. There is no explanation by the District Magistrate in the matter. I therefore direct that the record be sent to him in order that he may point out in what way the procedure is open to criticism other than the fact that certain evidence has not been recorded. [On receipt of the report of the District Magistrate his Lordship passed the following:]

Order.—I have read the report of the District Magistrate. I do not think it is quite fair to the accused in the present case to direct his re-trial. There is only one witness left for examination and a few questions to be put to the police officer who conducted the case. I therefore allow the application to this extent that I set aside the order of the District Magistrate directing a re-trial. I direct the District Magistrate to summon the witnesses named by him in his report to examine them and after so doing, to decide the question of the applicant's innocence or guilt.

V.B./R.K. *Application allowed.*

A. I. R. 1918 Allahabad 134

KNOX, J.

Har Kesh and another—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 1003 of 1917, Decided on 18th March 1918, from order of Addl. Sess. Judge, Meerut.

Penal Code (1860), S. 366—Girl under 16 taking food to bullocks at father's bidding persuaded by accused to accompany him—Accused dressing her up as boy and living with her for some time—Accused is guilty under S. 366.

A girl, under 16 years of age, was sent by her father to take food to the bullocks, when on her way she was persuaded by the accused to accompany him. The latter cut off her hair and dressed

her up in boy's clothes and lived with her for some time.

Held: that the accused was guilty of the offence of abduction under S. 366 with the intent that the girl might be compelled to marry against her will or forced or seduced to illicit intercourse. [P 136 C 1]

A. H. C. Hamilton—for Appellants.

Lalit Mohan Banerji—for the Crown.

Judgment.—Harkesh and Bhullan have been convicted of offences under Ss. 366 and 368, I. P. C. The charge-sheet, to which they were called upon to plead, as regards Harkesh is:

"That you about the month of April forcibly took Mt. Hardai, a minor girl of about 15 years, from the lawful guardianship of her parents, with intent that she may be seduced to illicit intercourse and be sold in marriage to some one."

As regards Bhullan the charge runs:

"That you about the month of June, July and a part of August kept Mt. Hardai, hiding her identity that she was a girl, with the intention of giving her in marriage and raising money from the transaction, knowing that she was a minor girl kidnapped by Harkesh."

The case was tried with two assessors. Both assessors gave it as their opinion that Harkesh and Bhullan were guilty of the offence specified in the charge. The learned Judge agreed with the assessors. Harkesh and Bhullan are described as Jats, the girl, respecting whom they have been charged, is also a Jat girl. Both the accused have been represented in this Court by learned counsel. Great stress has been laid on the improbability of the story given by the girl. The medical evidence shows that she is a girl under 16 years of age and in considering whether the offence charged has been committed by the accused or not, the evidence to which we should first turn is not the evidence of the girl but the evidence of her father, Niadar. The offence is primarily an offence against him. I have carefully considered his evidence and I see no reason to doubt it. He tells us that at the time when the girl Hardai disappeared he was ill with fever. The girl was sent one evening to take food to the bullocks.

The husband and wife returned shortly after and found the girl had not gone home and had not fed the bullocks. He made inquiries from his neighbours but no one had seen the girl. He was laid up with fever for several days but as soon as he could, he went and searched in the neighbouring villages but could find no trace of his daughter. He tells us that this was not the only occasion

upon which he searched for his daughter. He admits that he made no report at the thana. Stress is laid upon this as being improbable conduct and not in harmony with the rest of his deposition. But he gives his explanation. He was afraid that if inquiry was made the girl might be spirited off further, and he adds that he did fear that the chances of marrying would be spoilt if the news got about. Any one who is aware of a Jat's difficulties and prejudices can easily understand this and I see nothing at all improbable in it. The medical evidence places beyond doubt that the girl at the time the occurrence took place was under 16 years of age. Niadar is supported in his statement by the witness Bija. I have examined his evidence also with much care and it fully supports what Niadar has said. If their statements can be believed—I see no reason why they should not be believed and they have been believed by both the Judge and the assessors who heard the evidence, there is no room for supposing that Niadar was in any way privy to the removal of the girl or that he took no interest in her welfare. When the girl was found first to the knowledge of Niadar, she had been discovered in a village not far distant from the village in which Niadar resides. There is not one word in the cross-examination which supports that either Niadar or Bija or any of the Jats of Kutta had any cause for quarrel or grudge against either of the accused.

It is admitted by both the accused that the girl Hardai was in their company at about the time when she disappeared and it undoubtedly rests with Harkesh and Bhullan to explain how the girl under these circumstances came into their company. The girl was a female under 16 years of age her lawful guardian had not consented to her being removed out of his guardianship. As regards the matter of time the story is here taken up by the girl. I agree that what she says cannot be believed. Her account is that she met Harkesh, was assaulted by him, dressed in male clothes, taken and shut up and her hair cut. This is only one of the stories told by her and it entirely disagrees in important points with the second story which she told. I discard her evidence and put it out of consideration. What I have to see is how the girl passed from the guardianship of Niadar

to the keeping of Harkesh. It is quite possible that Harkesh came upon her as she was on her way home to do her father's bidding and that she was persuaded by him to accompany him and afterwards to put on male clothes and to work for him. There is evidence put forward for the defence that the girl came wandering dressed in boy's clothes, that she asked for work and was engaged by Harkesh. I agree with the learned Judge and assessors in not believing this story. It is in the first place improbable and in the second place the evidence given is so vague, just when ought to be definite.

Bearing all this in mind I am satisfied that an offence under S. 366, I. P. C., has been fully proved against Harkesh and I dismiss his appeal. With reference to Bhullan there is the evidence of his witnesses Shera, which is of great importance. No reason has been shown why Shera's evidence should not be believed. He tells us that he had seen this girl living at Bhora first with Harkesh and then with Bhullan. She was dressed as a boy. People began to suspect she was not a boy but a girl. On his making inquiry as to her sex Hardai said she was a girl. Next morning both the accused and the girl had disappeared. Lohari who is Chaukidar says that as he was going to his field, about the time mentioned, with other people, he saw the girl dressed in boy's clothes and carrying Bhullan and Harkesh were quarrelling close by. Each was saying that he would take away the girl; he asked the girl, thinking it was a boy but the reply was, "I am not a boy but a girl." She also said they were taking her about and she feared they would kill her. Upon this Bhullan began to make off but the witness ran after him and arrested him. There is nothing in the cross-examination to show that this witness has any malice against Bhullan. I hold this evidence is enough to show that at that time the girl was being by force compelled to go about with these two accused and that their act amounted to abduction. On behalf of the accused I was referred to the case of *Ewaz Ali v. Emperor* (1). That however was a different case.

The girl in that case was one who was found to have left the guardianship of her husband with intention to remain

1. A I R. 1915 All 890=37 All 624=30 I O 647
=16 Or L J 668.

out of that keeping. It so far differs from the present case and I am not prepared to follow it. I was also referred to the case of *Empress of India v. Sri Lal* (2). That was an absolutely different case and is in no way a guide in the present case. The case of *Emperor v. Ramchander* (3) is also quite different, but I need only refer to the concluding words of that judgment to show that the circumstances of that case and of this case do not agree. The learned Judges say:

"We need hardly point out that the case would be very different if the girl had been going on a visit or message or any such like occasion."

The evidence in the present case satisfies me that the girl was going on a message when she disappeared. The case of *Emperor v. Jetha Nathoo* (4) is, in my opinion, a case exactly in point. As the learned Judges there point out, what have to be considered are the broad features of the case. I hold that a case of abduction with intent that the girl might be compelled to marry against her will or forced or seduced to illicit intercourse has been abundantly proved against Bhullan and I dismiss his appeal. My attention has been called to the case of *Abdur Rahman v. Emperor* (5). With great respect to the learned Judge who decided that case I hold that in that case the evidence showed that Abdur Rahman, if he did any act at all, did an act subsequent to the alleged offence of kidnapping. The Indian Penal Code does not recognize abetment after the main act, and the arguments therefore really amount to an obiter dictum. There remains the question of sentence. Looking at all the features of the case I think the sentences have been unnecessarily severe. I allow the appeal, so far that I reduce the sentences passed to a sentence of three years' rigorous imprisonment, both in the case of Harkesh and Bhullan; the sentences served by them will be considered part of this sentence. So far and no further I allow their appeals.

V.B./R.K.

Sentences reduced.

2. (1878-80) 2 All 694.

3. A I R 1914 All 376=15 Cr L J 265=23 I C 473.

4. (1904) 6 Bom L R 785=1 Cr L J 931.

5. (1916) 38 All 664=17 Cr L J 498=36 I C 466.

A. I. R. 1918 Allahabad 136 Special Bench

RICHARDS, C. J., TUDBALL AND
ABDUL RAOOF, JJ.

Har Prasad Singh, Vakil of Banda In re.

Criminal Misc. Case No. 367 of 1917, Decided on 4th May 1918, reference made by Sess. Judge, Banda, D/- 30th November 1917.

Legal Practitioners Act (18 of 1879), S 13—Professional misconduct—Pleader intimidating witness to prevent him from giving evidence is guilty—Letters Patent (Allahabad) Cl. 8.

A pleader who intimidates a witness in order to prevent him from giving evidence in Court is guilty of professional misconduct.

[P 149 C 2; P 150 C 1]

Motilal Nehru, Peare Lal Banerji, Damodar Das and Purushottam Das Tandon—for Vakil.

Ryves and Hoskins—for the Crown.

Richards, C. J.—In this case we are called upon to investigate two charges of alleged misconduct on the part of Babu Har Prasad Singh, who is stated to be the leading pleader at Banda. The first charge relates to matters which are alleged to have taken place as far back as the year 1915. It would seem that in that year (and even now) there are two rival factions in the Municipality of Banda. Har Prasad was certainly associated with one of these parties, although he had ceased to be a member of the Municipal Board before the happening of the matters to which I shall refer presently. Unfortunately there are strong indications that these factions were not wholly influenced by a wholesome rivalry to do what was best for the residents of Banda City. On the contrary Har Prasad contends that the present charges against him are altogether false and have been engineered by the opposing faction. In the year 1915 a charge was made against one Sheo Prasad of having defrauded the Municipality. This Sheo Prasad was in the employment of the Municipal Board and it was alleged against him that he had bought on behalf of the Municipal Board inferior gram at a low price and charged the Municipal Board the price of good gram. There can be no doubt that the case of Sheo Prasad was made a "party" case between the two rival factions. One party was anxious to have him prosecuted; the other party was anxious to shield him.

An inquiry was held by the Municipality and Har Prasad appeared professionally for Sheo Prasad at this inquiry. In the end Sheo Prasad was committed to trial in the Court of Session and convicted. He appealed to the High Court and the conviction was set aside by a learned Judge. At the trial of Sheo Prasad one Maiku (otherwise Langra) was examined as a witness. The first charge against Har Prasad is that prior to the examination of Maiku he (Har Prasad) sent for him and told him that he should not give evidence and accompanied this order with an intimation that if he did give evidence it would be so much the worse for him. It is contended on behalf of Har Prasad that he labours under considerable difficulty in having now to meet and disprove matters which occurred as far back as the year 1915. This is undoubtedly true but the prosecution (if I may use the expression for want of a better) is not to blame because the interference with Maiku as a witness in a criminal case, if true did not come to light in such a way that it could be reported to this Court until quite recently. It happened thus: A criminal charge was brought against one Sarju by a man named Prag Dat, a warder in the Banda Jail, alleging fraud in connexion with the purchase of a cow. Sarju alleged amongst other things that this false case had been engineered against him by the leaders of one of the rival, factions to which I have already referred, in consequence of certain action which he took in connexion with the case of Sheo Prasad. The case was also made a "party" case. A witness of the name of Ram Nihore was examined on behalf of Sarju, and at the conclusion of his evidence he stated that Har Prasad had come to his house which is at Manikpur quite close to the railway station and told him that he was not to appear as a witness on behalf of Sarju, and that if he did it would be worse for him or words to that effect.

It is this statement by Ram Nihore which led to Har Prasad being reported to this Court and the allegation that Har Prasad attempted to interfere with Ram Nihore giving evidence in Sarju's case forms the basis of the second charge against him. Har Prasad, as already stated, appeared for Sheo Prasad at the inquiry which the Municipality held. He subsequently appeared for him at the

trial before the Court of Session. But Har Prasad says that he was not acting on his behalf in the interval between the inquiry by the Municipality and the trial at the Court of Session. Har Prasad also appeared professionally to support the prosecution against Sarju, but he states that the part he took was practically confined to making suggestions and that the conduct of the case was left in other hands. Maiku was examined before us in support of the first charge. He stated that he was sent for on a particular day, that in consequence of what the messenger said he went with the messenger in the evening to the house of Har Prasad and that Har Prasad then told him that he must not appear as a witness. He at once agreed not to do so. He stated that there was another person present whose name he did not know but who was the Karinda for a zamindar of the name of Kashi Nath.

The witness was cross-examined as to the time and the description of Har Prasad's house and premises. The witness answered these questions apparently correctly. His demeanour was good and he had all the appearance of a truthful witness. Maiku further stated that after he had had the interviews with Har Prasad, Sarju came to him and told him he must give evidence. He at once agreed. The next witness was a man called Ejaz Husain. He was the Karinda of Kashi Nath, and he stated that on a particular day in July 1915 he had gone to the house of Har Prasad to speak to him about legal business of Kashi Nath. I must here mention that admittedly Har Prasad conducts the greater part, if not the whole of the legal business of Kashi Nath. He says that he found Maiku already there, that he heard the conversation which took place between Maiku and Har Prasad. Maiku went away after a short time and he (the witness) remained behind and talked over the business about which he had come. This witness was unable to mention the case or the nature of the business about which he had come to Har Prasad. He was cross-examined to show that he had already left the service of Kashi Nath in July 1915, and that therefore it was impossible that he could have come to speak to Har Prasad upon the business of Kashi Nath. He was also cross-examined to show that he having been subsequently

re-appointed Karinda to Kashi Nath, he was dismissed a second time at the instigation of Har Prasad. The object of this last part of the cross-examination was to indicate a reason why Ejaz Husain might give false evidence against Har Prasad. Ejaz Husain admits that he ceased to be in the employment of Kashi Nath in the month of July 1915, but he says that he was not dismissed by Kashi Nath but that he left of his own accord. Kashi Nath was examined afterwards on behalf of Har Prasad and he produced a book which showed that a registered notice had been sent by him to Ejaz Husain. He produced the letter from Ejaz Husain in answer to his notice. From the answer which Ejaz Husain admits having sent it would appear that the registered notice was a notice requiring Ejaz Husain to hand over certain documents belonging to Kashi Nath which were in his possession as Karinda. The answer was a very proper answer and explained that the only reason why the documents were not handed over was that the agent sent by Kashi Nath for the documents refused to give a receipt. This notice was sent on or about 19th July 1916. Maiku is of course unable to state the exact date in July 1915 that he visited Har Prasad, but from other circumstances it would appear that if this interview took place at all it must have been about 10th July. Kashi Nath says that he dismissed Ejaz Husain in July. Neither Kashi Nath nor Ejaz Husain are able satisfactorily to give the exact date when Ejaz Husain ceased to be Karinda to Kashi Nath.

It is admitted that whether Ejaz Husain was dismissed or ceased to be Karinda of his own accord, he did give up the employment in July and I am inclined to think that the employment must have come to an end some little time before the sending of the notice to give up the documents. My reason is that I think the ceasing to be employed as Karinda must have preceded the notice and I think this notwithstanding that Kashi Nath produced the book to fix the time when the employment ceased. This circumstance, coupled with the fact that Ejaz Husain is either unable or unwilling to state the nature of the business about which he went to Har Prasad, detracts to some extent from the value of his evidence. Siddik Husain, Sub-Inspector,

was examined and stated that he got information that attempts would be made to tamper with the witness against Sheo Prasad and that in consequence of the information he approached Sarju, whom he knew to be a man who would be likely to have influence with Maiku, and that very shortly after Sarju had seen Maiku he took the precaution of having the evidence of Maiku recorded under S. 164, Criminal P. C. That the evidence was so recorded it is admitted. Sarju deposes to the fact that he did interview Maiku and learnt from him that Har Prasad had told him that he was not to give evidence. Maiku apparently without any hesitation agreed that he would give evidence. Har Prasad gave evidence and absolutely denied having ever had any interview of any kind with Maiku. He stated that after Ejaz Husain had been re-employed in December 1917 by Kashi Nath, he in the month of February of this year strongly urged Kashi Nath not to keep Ejaz Husain. It appears that after Ejaz Husain in the year 1915 ceased to be in the employment of Kashi Nath, he went into the employment of one Debi Prasad, a nephew of Kashi Nath. There was some friction between the uncle and nephew, and Har Prasad says that he gave as a reason to Kashi Nath for not retaining Ejaz Husain that he was the mischief maker. Kashi Nath was not present when Ejaz Husain gave his evidence. The learned Advocate for Har Prasad professed to be taken completely by surprise by the evidence of Ejaz Husain. Kashi Nath was sent for from Banda and arrived and was examined in the case. He is apparently a respectable zamindar. His evidence was not very satisfactory. A letter of his was put into his hand (dated March 1917) in which he addressed Ejaz Husain as "Karinda" and spoke to him about a case of his (Kashi Nath). Another letter, dated August 1917, was also produced and the two documents go to show that at the time the relations between Kashi Nath and Ejaz Husain were not at all unfriendly and that the letter had to do with Court work.

There is a direct conflict between the evidence of Har Prasad and Kashi Nath as to the circumstances connected with the alleged dismissal of Ejaz Husain in February of the present year. Ejaz Husain states that he was never dismissed at all, and on the day he first gave his

evidence he said that Kashi Nath actually came to the railway station with him when he was coming away to attend this Court. Kashi Nath says that the reason Har Prasad gave for advising him not to retain Ejaz Husain in his service was that he had not trusted him in 1915. He told us that he never communicated to Ejaz Husain the fact that Har Prasad had advised that he should be dismissed, and that as a matter of fact he did not actually dismiss him. He says that he was no doubt influenced by what Har Prasad said, but the actual dismissal took place in this way that Ejaz Husain said that he was not satisfied with him (Kashi Nath) and that he (Kashi Nath) then said, "well, brother, as you are not satisfied we had better part," or words to that effect. The discrepancy between Har Prasad and Kashi Nath on this matter is somewhat significant, because it relates to events which happened only a very short time ago. It was strongly urged on behalf of Har Prasad that it was very unlikely that he would have committed such a serious offence as to order Maiku not to give evidence in the presence of Ejaz Husain, and that if he wanted to interfere with a witness like Maiku he would not have done so directly. I think that these are matters which we certainly should consider. It was also contended that it was unlikely that Har Prasad would even know that Maiku was to be a witness, because his name had never been mentioned in the preliminary inquiry held by the Municipality nor at all until his evidence was recorded under S. 164. On the other hand the prosecution say that Maiku was an obvious witness from the very commencement. I am not satisfied that Maiku was an "obvious" witness, while on the other hand I see nothing in the least unlikely that Sheo Prasad should have told Har Prasad that Maiku was likely to be examined as a witness against him. If the case against Sheo Prasad was true, I think that it would be almost certain that Sheo Prasad would have told Har Prasad, who was his *vakil* presumably taking a keen interest in his case.

Mr. Peare Lal Banerji asked us to deal with the present case on the assumption that Sheo Prasad was innocent because he was acquitted by the High Court. I do not think that we can do this. Sheo Prasad is entitled to the full benefit of

his acquittal, but I do not think that any person else is entitled to ask us to hold that the acquittal of Sheo Prasad conclusively demonstrates his innocence. The judgment of the High Court seems to have given Sheo Prasad the benefit of the doubt. One of the reasons for the acquittal was the supposed somewhat late appearance of Maiku as a witness. It is possible that the High Court's attention was not drawn to the fact that his evidence had to be recorded under S. 164, Criminal P. C., (i. e. as a witness who might be tampered with), and the High Court had not before it the evidence which we have had in the present case that the witnesses were being tampered with. It appears that not only the evidence of Maiku but also of a number of other witnesses was recorded under S. 164. Mr. Peare Lal called out our attention to the difficulty which his client is under in having to meet a charge which relates to matters which happened in the year 1915. While the prosecution are not to blame for this, I think it is a matter to which we should give careful consideration. A number of professional gentlemen appear for Har Prasad. It appears that they are giving their services gratuitously.

One would have thought in the present case that one of the first things that would have been done would have been to have made an application to the prosecution for particulars as to the time and manner at and in which Har Prasad was alleged to have interfered with the witness Maiku. No particulars of any kind seem to have been asked for. The only thing which was done was a verbal request to the Government Advocate to give the names of the witnesses he intended to call, which request was complied with and amongst these witnesses the name of Ejaz Husain was mentioned. Har Prasad is an experienced pleader and if he was in the dark as to the charge against him, it ought to have occurred to him to ask for particulars.

I now come to the second charge. This case also undoubtedly became a "party" case. Sarju was the accused and he alleged that the case was a false one got up against him on account of the active part which he had taken against Sheo Prasad. (I may mention here that Sarju was acquitted.) The evidence in support of the second charge is confined to that

of Ram Nihore. He states that his house is quite close to Manikpur Railway Station and that Har Prasad whilst waiting at the station came in and told him not to give evidence. It must be said in favour of this witness that he not only stated this when he gave evidence on behalf of Sarju but he also mentioned two persons who were present at the time. These two persons have not been called either by the prosecution or by the defence. Ram Nihore states that he refused to be influenced by Har Prasad and that he told the latter that he would give evidence. Har Prasad swears that he never went to the house of Ram Nihore and he produces two witnesses who accompanied him on the day he travelled from Banda to Allahabad. The allegation of the prosecution is that the visit to Ram Nihore was paid whilst Har Prasad was waiting at Manikpur Junction. Har Prasad had to change at Manikpur and remain there for about two hours before he got the train for Allahabad. The first witness was a man named Shah Saidullah. He is the Bench Reader in the Court of the Sessions Judge at Banda. The other man was Abdul Shakur, who is a Sub-Assistant Surgeon. Both of these witnesses stated that that it was impossible for Har Prasad to have gone to the house of Ram Nihore without their being aware of the fact and that he did not go.

Considering that the house of Ram Nihore is very close to the station, one is a little inclined to doubt the evidence of these two witnesses. They had no particular reason for keeping Har Prasad under observation. A letter was produced written by Har Prasad to Saidullah in which the former asked the latter to state his recollection of all that occurred during the wait at Manikpur. Saidullah writes his reply on the same sheet of paper and professes to be quite unaware of the reason why Har Prasad had asked him, and in his evidence in this Court Saidullah said that he did not know the reason. A week before this letter was written the Magistrate had made an order against Har Prasad in this very case, and considering the position of Har Prasad and the fact that Saidullah is the Bench Reader in the Sessions Court, I do not believe that Saidullah did not know the reason why Har Prasad had written to him. The Sub-Assistant

Surgeon was mixed up in the case against Sarju. I do not think that either of these witnesses can be regarded as altogether independent witnesses upon whose testimony the Court should place implicit confidence. Nevertheless the evidence on the second charge is the oath of Ram Nihore against the oath of Har Prasad and Ram Nihore admits that he was convicted 14 years ago and sentenced to two years. The charge was robbery. Ram Nihore is a Brahman by caste.

He looks respectable and notwithstanding his conviction he apparently occupies a respectable position and has outlived his conviction. In his cross-examination he seemed to admit that he was justly punished for violence but not for stealing. We must consider why it was that Ram Nihore told about the alleged visit of Har Prasad. He volunteered the statement.

A reasonable explanation would be that he apprehended that evil might befall him in consequence of his having given evidence. If he volunteered the statement for any other reason it would put a different complexion on his evidence and indeed on the whole case. In this connexion we must not lose sight of the fact of the existence of the two hostile factions. Har Prasad contends that the present charge is the result of a conspiracy against him. Let us assume for a moment that what Ram Nihore says is untrue and that Har Prasad never went to his house at Manikpur. This would mean that the enemies of Har Prasad conspired at or before the time of the charge against Sarju that Ram Nihore, when called as a witness for Sarju, should falsely volunteer the statement that Har Prasad had ordered him not to give evidence, in the hope that the statement would get him (Har Prasad) into trouble. Such a conspiracy seems highly improbable. I have approached the consideration of this case as if it were a criminal case in which a very serious charge was being made against Har Prasad. I think that we ought to give him the benefit of any reasonable doubt if we have any. I have given the case anxious consideration not only at the hearing, but in the interval which has elapsed. I have discussed the case and the various points I have mentioned with my colleagues also. Most reluctantly I come to the conclusion that the charges are true.

Tudball, J.—Babu Har Prasad Singh, a vakil, has been called upon to show cause why this Court should not deal with him in the exercise of its disciplinary powers under S. 8, Letters Patent. A Deputy Magistrate of the first class has made a report in respect to his conduct on 21st November 1917, which was forwarded to this Court by the District Magistrate on 30th November 1917 and notice was issued on 21st January 1918 to the vakil together with copies of both reports. The Magistrate preferred four charges. Of these two have not been pressed by the learned Government Advocate and our inquiry has been limited to the remaining two. These are charges of a similar nature, viz. that the vakil in each case threatened a person who was about to give evidence in a criminal matter with a view to deter him from giving such evidence. In a way the two cases are connected with each other and I propose to state the facts which have led up to them. Babu Har Prasad Singh is said to be the leading pleader practising in the Subordinate Courts at Bhandia, a small town where the headquarters of the civil administration of the District are situated. There is a Municipality governed by a Municipal Board. What is exactly meant by saying that Har Prasad Singh is the leading pleader is not quite clear. He has a good local practice. He is fairly young and takes an active and keen part in local public matters and is a man of considerable local influence. He takes an interest in Municipal matters and at least up to 1912 or 1913 was a member of the Municipal Board. He was then unseated and there was some litigation about the election and at present he is not a member of the Board.

It is common ground that in respect of Municipal matters there were to contending parties in the town which, as is so often the case, devoted their time and energy not so much to furthering the public interests as to thwarting and defeating each other. There is little doubt that Har Prasad Singh was the leading spirit of the one and one Muhammad Raza Husain that of the other party. Such was the state of local feeling in the year 1914 when an accusation was preferred by Muhammad Raza Husain in his official capacity against one Sheo Prasad, an employee of the Municipal Board. The latter was an

officer who held in his hands an advance of public money and was entrusted among other duties with the purchase of grain for the feeding of the Board's draught cattle. The charge against him was that he had purchased "weevil eaten" gram at a cheap rate and had charged for good-gram at full rates. The purchase was said to have been made from one Sheo Nath. An inquiry was directed by the Municipal Chairman to be made, and Muhammad Raza Husain was entrusted with the collection of the evidence. Of course he had no powers to summon witnesses or enforce their attendance and he had to go about inquiring from persons and take their statements. Like all things municipal in this country, there was a considerable waste of time owing to friction between the Chairman and Raza Husain; and the opposite faction took upon themselves the protection of Sheo Prasad.

The latter admittedly engaged the service of Babu Har Prasad Singh to watch his interests in the inquiry. Matters dragged on till July 1915. The act charged amounted to a criminal offence and in that month the matter was made over to the police for inquiry and necessary action. The police inquiry was made over to the Kotwal Sub-Inspector Mohammad Saddik, who began it on 14th July 1915. In the course thereof he examined one Maiku (alias langra) as a witness. As there were outside influences at work and he had information that attempts were being made to prevent the witnesses giving their evidence, Mohammad Saddik placed all the witnesses including Maiku before a Magistrate and caused their statements to be recorded under S. 164, Criminal P. C. This is a step which is usually taken by a Police Officer when he has reason to believe that influence will be or is being brought to bear on a witness to prevent him testifying in Court. The case was then placed by the Police Officer for inquiry before a Magistrate who committed Sheo Prasad for trial to the Court of Session. The Sessions Judge at the trial found him guilty and convicted and sentenced him. Babu Har Prasad Singh was a witness for the defence of Sheo Prasad and gave evidence on his behalf. At both the inquiry and trial Maiku gave evidence for the prosecution, swearing that he was the weighman who actually weighed the

gram which had been sold by Sheo Nath to Sheo Prasad.

He testified as to its quality. He is a professional licensed weighman who receives his fee at the time of weighment. Sheo Nath also followed the same profession, but the gram that he sold was alleged to be his own personal property. He had had it in his possession for some time and he sold it cheaply according to the prosecution case, because it had been attacked by weevils. It is obvious that if this were true, the man who actually weighed the gram must have seen and recognized its condition. It is equally obvious to one who has any knowledge of how grain dealings in an Indian market are carried out and is experienced in investigating crime that in such a case as Sheo Prasad's, the weighman would be a witness of some importance one way or the other. At the Magisterial inquiry and at the trial in the Court of Session Babu Har Prasad Singh appeared and acted for Sheo Prasad. The latter appealed to this Court and the learned Judge who heard the appeal considered that there was room for considerable suspicion. He criticised the action of Raza Husain in the matter, laid stress on the fact that Maiku had not been examined as a witness at the Municipal inquiry and hesitating to accept the evidence he gave the accused the benefit of the doubt in his mind and acquitted him. The date of the High Court's order is 15th March 1916. This closed the first phase of the battle. It had a sequel. The Police Officer Mohammad Saddik was transferred to another District and in the first half of 1917, a charge of cheating in respect to a cow was preferred by one Prag Dutt, a warder at the Banda Jail, against one Sarju Singh.

The latter is fairly well-to-do resident of Banda who deals in grain, etc., and who supplied grain on contract to the Jail. Prag Datt's case was shortly that Sarju Singh had asked him to sell him a cow for Rs. 30 saying that it was required for the Civil Surgeon, that he Prag Datt, said that if it was wanted for the Civil Surgeon he could have it for nothing and that Sarju Singh took it. Later on he discovered that Sarju Singh had lied to him and he put the matter into the hands of the police. The latter after making inquiry sent the case up for trial to the Court of Babu Shimbu Narain in May

1917. Sarju Singh for certain reasons objected to the case being tried by that Magistrate and succeeded in securing its transfer to the Court of Mr. S. M. H. Rizwi, a Muhammadan gentleman who finally decided the case on 31st October 1917, acquitting Sarju Singh. By reason of what came to light during the course of this trial the Magistrate "at once" took action against Babu Har Prasad Singh. He at first issued notice to the pleader and began an inquiry. Objection was apparently taken to his jurisdiction and he at once stopped his inquiry and submitted his report on 21st November 1917, through the District Magistrate to this Court. Sarju Singh in his defence pleaded that he had purchased the cow for Rs. 40 from Prag Datt, that he had paid down Rs. 18 and had subsequently paid the balance of Rs. 22 and obtained a receipt for the whole in the presence of certain persons, Dhani Ram, Ram Nihore, etc.

He filed a long written statement, explaining how his relations with the Subordinate Jail staff had become strained and why they were interested in bringing a false charge against him. He further alleged in para. 10 thereof that certain persons, of whom Babu Har Prasad and Kashi Nath were two, bore him a grudge by reason of the part he had taken in assisting the police in the inquiry made in 1915 in Sheo Prasad's case. Now in the case based on the complaint of Prag Datt, Babu Har Prasad Singh was engaged by Prag Datt to prosecute Sarju Singh and it was and still is the latter's complaint that Babu Har Prasad Singh had personal as well as a professional interest in the matter and was trying to secure his (Sarju's) conviction on a false charge because he (Sarju) had helped to secure the conviction of Sheo Prasad. In his defence Sarju Singh summoned Inspector Muhammad Saddik and Ram Nihore amongst other witnesses. Mahomed Saddik testified to the fact that while he was investigating the case against Sheo Prasad he got information that Babu Har Prasad Singh was attempting to prevent Maiku giving evidence, that as Sarju Singh was a person who in the course of business had dealings with Maiku and had considerable influence over him, he approached him and asked him to use his influence over Maiku to get the latter to be firm and to tell the truth and Sarju

Singh did help him and spoke to Maiku. This evidence was given on 2nd October 1917. On 1st October i.e., the day before Ram Nihore had been examined and had testified to the payment of Rs. 22 and the execution of a receipt. After his evidence had been recorded, read over to and signed by him, he turned to the Magistrate and appealed to him. He said that on Saturday September 29th i.e., two day before, Babu Har Prasad Singh and Prag Dat had both come to his house (which is just outside the railway station at Manikpur) in the afternoon and that the former, after asking him whether he was a witness in Sarju Singh's case and being informed that he was, had told him that he was not to give evidence otherwise he would get into serious trouble (serban hoge).

On hearing this the Magistrate at once placed him on oath again and recorded his statement on the point. Ram Nihore mentioned two persons, Ganesh Prasad and Harbans Prasad, as having been present on the occasion. The complainant Prag Dat was clearly present in Court when this took place. He has admitted that he was in Court that day so long as the hearing lasted and record also mentions this, but he says he did not hear the statement made. Babu Har Prasad Singh was not in Court. The cross-examination of Ram Nihore was postponed to 2nd October to enable Har Prasad to cross-examine him, but as the latter did not appear on 2nd October the witness was cross-examined by the Court Inspector who did not question him about the incident of the 29th September. Babu Har Prasad Singh appeared at the trial on the 3rd October and subsequent dates till the decision on the 31st October (vide the record). Though he must have been well aware of the accusations made against him, he up to the 31st October made no protest in Court or attempt to deny the truth of Ram Nihore's statement. The Magistrate after the decision immediately issued notice to Babu Har Prasad Singh under the Legal Practitioners Act and commenced an inquiry. He subsequently as I have stated above, found that he had no jurisdiction and reported the matter for the orders of this Court. We have made the inquiry and examined the evidence.

The two charges are: (1) that on or about 10th July 1915 he, Har Prasad

Singh, in his own house at Banda did send for and intimate the witness Maiku alias Langra to prevent him giving evidence against Sheo Prasad; (2) that on 29th September 1917, at Manikpur he similarly intimidated Ram Nihore to prevent him giving evidence on behalf of Sarju Singh, Mahomed Saddik, Inspector and Ram Nihore. Babu Har Prasad in his defence has given evidence and has examined only four out of the large number of witnesses summoned on his behalf. Maiku's evidence is to the effect that a few (5 or 6) days before he was examined by the police in the course of their investigation in July 1915, Babu Har Prasad Singh sent a man to his house who took him to Har Prasad's house. It was evening time, about 7 or 8 p.m. He was taken to the vakil's office. Har Prasad Singh told him that he was not to give evidence in Sheo Prasad's case or he would cause him to be sent to jail. He acquiesced as most men in his position in this country would have done. The only person whoever heard the conversation was the Karinda of Babu Kashi Nath, whom he knew by sight but not by name. A few days after, Sarju Singh came to him and questioned him. He told him of Har Prasad's threat. Sarju Singh told him not to be afraid but to stick to the truth. He was then examined by the police and was placed before a Magistrate who recorded his statement in the matter of Sheo Prasad.

The witness gave his evidence in a very satisfactory manner and stood his cross-examination well. It was stated that he had no knowledge of Har Prasad's house and had never been inside of it. He was closely cross-examined on the point but his manner and his face and the way in which he gave his description showed clearly that his statement on the point was true. No evidence of any sort has been called to show that he has made even any errors on this point. The man, of course, is only a weighman and persons of his class can easily be bought over to give evidence. It is true that in the course of the Municipal inquiry he was not brought forward and examined, but no weighman apparently was examined and it is obvious that a weighman is employed when grain is purchased. It was we are told, Sheo Prasad's case that he personally purchased no grain but that all purchases were made by his co-accused

in that case, a Municipal sweeper, Sheo Nath, the person who was said to have sold the grain, was apparently examined during the Municipal inquiry but Maiku seems not to have been named. Sheo Nath is now dead and cannot be examined. It has been urged that Har Prasad Singh could have had no knowledge whatsoever even of Maiku's existence, that he had nothing to do with the matter after the Municipality had decided to prosecute until it came into Court and therefore he could not possibly have sent for Maiku. In the state of affairs existing at Banda in regard to Municipal matters and the leading position which Har Prasad occupied, I cannot believe this. He fought for Sheo Prasad throughout and if the case against the latter was a true one, Sheo Prasad and Har Prasad would most certainly have understood the importance of Maiku as a witness. He actually handled the grain (assuming the case to have been a true one) and must have seen and recognized that the grain was weevil eaten. One cannot mistake grain of that kind. The chief point against him is that he did not come forward in the course of the somewhat amateur inquiry made by an Indian Municipal member. His statement moreover does not stand alone. It is supported by the evidence of Sarju Singh and Muhammad Saddik and directly corroborated by that of Ejaz Hussain. I will discuss the value of their statements later. There is one fact which cannot be denied, viz., that the police deemed it necessary to have the statements of all the witnesses recorded by a Magistrate at the latter's house.

The witness also is subject to the influence of Sarju Singh who at present is embittered against Har Prasad in view of Prag Dat's case against him, but the matter that is now before us was put forward for the defence in that case and Muhammad Saddik's evidence in the matter was recorded. Sarju Singh has testified to the part he took in that matter at the request of the police officer. His house is near the Police Station. He knew the Kotwal and was on friendly terms with him. He dealt in grain and of course had concern with the licensed weighmen of the bazaar. The Police Officer sought his assistance in the matter and he gave it, with the result that he incurred the wrath of the party who sought to protect Sheo Prasad. When he was attacked, he

defended himself and brought the matter to light. It is highly probable that the opposite party assisted him. His statement is strongly supported by the evidence of Muhammad Saddik, Inspector of Police. This officer is no longer in the Banda District. He was transferred some time ago. He has testified to the manner in which he invoked Sarju Singh's assistance. He declined to give the name of the person who gave him information in respect to Har Prasad Singh's alleged action and as a Police Officer he is justified in his refusal. He gave his testimony in 1917 in Sarju Singh's case.

We are asked to disbelieve him because he made no entry in his diary about Har Prasad's alleged action and the steps he took to counter it, and it is faintly hinted (but in no degree proved) that the witness is a friend of M. Raza Husain who is hostile to Har Prasad Singh. There is no force in the plea as to the diary. The matter is one that one officer might record and another might not. No rule exists on the point and the witness' action in having the statements recorded under S. 164, Criminal P. C. is corroboration of his word. The other point has still less force. Some years prior to 1897 this witness was a Police clerk in the District of Hamirpur before he was ever stationed at Banda. A charge under S. 330, I. P. C. was preferred against him and the case was committed for trial to the Court of Session at Banda. He was honourably acquitted and has since risen to his present rank. He says that many persons in Banda took an interest in his case. To his knowledge Raza Husain did not assist him in the matter. He did not then know Raza Husain and if he took any interest in the case he, the witness, had no knowledge. This is the only attempt to show a connection between the two men. The witness gave his evidence in a very satisfactory manner and I have no hesitation in holding that he has told us the truth.

There remains on this point the important witness Ejaz Husain. This witness admittedly had been in 1915 a Karinda of Babu Kashi Nath for several years. He says that early in July 1915, he went one evening about 7 or 8 p. m. on his master's business to Babu Har Prasad Singh's house. He went to his office, he found Maiku and Har Prasad

Singh present and he heard the latter tell the former that he was not to give evidence or he would get him into jail. Maiku acquiesced and went away. He did his business with the pleader and also left. He says that he subsequently mentioned the matter to his master Babu Kashi Nath at the bistar of one Abdul Hai petition writer, who also heard him mention it. The witness is unable to tell us what was the business about which he had to see the pleader that evening. Babu Har Prasad totally denies the incident and it is his case that in July 1915 this man was not in Kashi Nath's employ, that Kashi Nath subsequently in the end of 1917 again re-employed the man but in February 1918 again dismissed him on the advice of Har Prasad Singh and the man has therefore now come forward by reason of ill-will at the instigation of Raza Husain to testify falsely. He says that the man after his first dismissal in 1915 took service with Lala Debi Prasad, the nephew of Kashi Nath, and by intrigue caused trouble between the uncle and nephew and was dismissed by the latter, that he (Har Prasad) called Kashi Nath's attention to this fact and got him to dismiss the man in February 1918, for this reason.

To establish those two points he took time to produce Kashi Nath and examined him as a witness. We have had before us the two men Ejaz Husain and Kashi Nath. We have seen and heard them both, and I have no hesitation in saying that of the two Ejaz Husain is far the better and more truthful witness. As compared with Kashi Nath who is an Honorary Magistrate and pays Rs. 15,000 Government revenue, while he is only a Karinda, he gave his evidence easily and straightforwardly, whereas the Honorary Magistrate fought repeatedly with the questions put to him, would not answer at once but repeatedly prevaricated and was finally out of his own mouth convicted of having said what was not true on at least one point. Ejaz Husain says that it was in July 1915 that he left the service of Kashi Nath but that he was in that service when the incident to which he testifies took place. Now the Police inquiry commenced on 14th July 1915 and the incident occurred according to the evidence about 5 or 6 days before i. e. about July 9th or 10th at the utmost. He admits that he then for

about 18 months took service with Lala Debi Prasad and then again in February 1917 was employed by Kashi Nath and up to the date on which he gave his evidence before us had not been dismissed, though he had not by reason of illness done any work for about a month, i. e. in March 1918. He is employed in the management of certain villages and he still has in his possession his accounts and village papers, Kashi Nath has produced some account books and a copy of a notice which he sent to Ejaz Husain on 19th July, 1915, and he says that it was in July that he dismissed the man. He has nowherestated that he dismissed him before 19th July 1915, and the notice which has been read to us nowhere contains an order of dismissal or even hints at it. We are asked to infer it. The notice was sent because the man had delayed in sending in his annual papers and Kashi Nath has admitted that he only dismissed him because he had so delayed. Ejaz Husain admits having received this so-called notice a few days after 19th July and admits the answer to it which was put before us. That answer is a straightforward one and explained the delay by stating that the agent sent by Kashi Nath to fetch the papers had refused to give a receipt for them and so he had not handed them over. Kashi Nath admits that the papers were ultimately handed over. Ejaz Husain has stated also that there had been some dispute about the rate of his salary for some two months prior to this and so he retired.

We are asked to hold on this evidence that the man was not doing Kashi Nath's work on July 10th or 9th and therefore could not have gone to Har Prasad's house. The evidence to my mind shows that the dismissal was subsequent to July 9th and not prior to it. Kashi Nath cannot fix any date earlier than July 19th. Stress is laid on the fact that Ejaz Husain cannot remember what his business was with Har Prasad on that evening. I do not think it fair on a witness to reject his evidence on so faint a reason as this. Kashi Nath wished us to believe that Ejaz Husain had no concern with any Court work, but that his duties were concerned only with the management of certain villages. Har Prasad Singh has admitted that on few occasions the man had been to see him. He (Har Prasad Singh) admittedly had been engaged for some 8 or

10 years as Kashi Nath's Pleader for the purpose of cases in the various Courts. Kashi Nath, however, was faced with the letter of 27th August 1917. He admitted that he wrote it and in the body of it is an order to Ejaz Husain to come to headquarters at once as he was required for a certain criminal case about which he had full knowledge and which he was to prosecute. The first point is, therefore not established. The second plea is still less established than the first. Har Prasad says that he called Kashi Nath's attention to the fact that the man was the person who had caused trouble between him and his nephew and that he ought not to have re-employed him and should get rid of him. Kashi Nath's statement is quite different. Har Prasad (he says) asked him why he had again taken on a man whom he had had to dismiss once because he could not trust him and that it was most inadvisable. Kashi Nath adds that he might have retained the man if it had not been for this advice and in fact he did not tell him why he was parting with him; that the man was displeased with him and so he said, "well brother, as you are displeased with me we had better part".

Ejaz Husain denies this. Kashi Nath has to admit that he has not taken accounts or the village papers from the man, which is curious if he was dismissed in February 1918. I much prefer the evidence of Ejaz Husain on the point. The old gentleman cut a very poor figure in the witness box and when he found himself being tripped up he took refuge behind the stone wall of "I don't remember".

He swore most positively that Ejaz had not been re employed by him until December 1917, though he had been approached by the man from September 1917 with a request for re employment. He was very positive that he had not made use of his service between February and December 1917 and had paid him no salary. He had to admit that he wrote the two letters of 27th March 1917 and 27th August 1917. The first is not of much importance beyond evidencing friendly relations. The second is addressed to Ejaz Husain as "Karinda" and the address is one of Kashi Nath's own villages. It directed him to come as a certain criminal case was coming on for hearing on August 29th, 1917, and his presence was necessary as he

"was cognizant of all the facts of the case and that he was to bring as much ghee and money as he had collected and to arrange for the collection of the rest and that he was to come quickly to attend to and prosecute the case."

The letter proves beyond doubt that Ejaz Husain was his Karinda in August 1917 and was working on his estate. The latter says that he was re-engaged from February 1917 and I do not hesitate to believe him. Kashi Nath after seeing the letter admitted that perhaps he had taken some work from him now and again and had made him a gift of money in exchange, but adhered to his statement that he did not regularly employ him until December 1917. The witness from the manner in which he gave his evidence was clearly not telling the truth. He admitted that he had trusted the man when he was in his employ that there was nothing against him except his delay in submitting his papers that there was no friction between them and that if Har Prasad had not spoken to him he would probably have retained his services, but he was not at all surprised or puzzled that so great a personage as Har Prasad should have troubled himself to get a lowly servant thus dismissed. He knew that Ejaz Hussain was summoned as a witness in this case against Har Prasad as the summons had come. He did not discuss the matter with him. He could not remember if he went to the station with him when the man left Banda by train (the man says he did, and this happened only a few days before the evidence was given).

The witness adds that he belongs to neither of the two factions in Banda, that when he saw how matters were trending he resigned his membership of the Board and cut himself off from them entirely. I have gone at somewhat great length into the evidence of these two men for a great deal depends on whether Ejaz Hussain is to be believed or not. He only hesitated once and that was when he was asked whether (the matter being an old one) he had recently made a statement on the point to any one. He admitted a bit reluctantly that he had been taken by Raza Husain to Mr. Hoskins (who appears with the Government Advocate) after his arrival in Allahabad and had made a statement to him, but on the whole his evidence was given easily without hesitation or prevarication and I accept it. It is pleaded that this man

came as a surprise to the defence and they had no idea of the matters to which he was to testify. There is little force in this plea, for the learned Government Advocate states that the man's evidence was obtained on an inquiry made by a Tahsildar Magistrate, that he himself gave a list of his witness to the gentlemen who appear for Har Prasad Singh prior to the Easter Vacation and had expressed his readiness to supply any information desired on any point, but no one had approached him.

The applications for the summoning of witnesses by both sides were made to this Court on April 2nd last. The learned gentlemen who have appeared for Har Prasad Singh at no time applied (as they could have done) for any further particulars. Even during the hearing of the case they took time to produce Kashi Nath, but did not deem it advisable or necessary to ask for any further time to meet the case against their client. We would readily and willingly have given further time on decent cause being shown nor is any further time even now requested.

Beyond doubt it is far more difficult to meet a charge relating to a date so far back as July 1915. We recognise the difficulty and would give every facility to the defence. If particulars had been requested they would at once have been given. I cannot see that the prosecution (if it may be so called) is in any way to blame. The matter could not be brought to the Court's attention before it came to the notice of the Magistrate and it only came to light in 1917, when Sarju Singh's defence was taken. Har Prasad Singh has said that he believes that the Magistrate Mr. Razwi has taken part in the manufacturing of a false case against him by reason of some puerile friction over a club in the starting of which he (Har Prasad) was considerably concerned, and he has mentioned some instances in which there has been friction between them. He admits that it is only his belief, there is no real ground for even throwing any such suspicion on the Magistrate. The blame however is chiefly thrown upon the opposing faction headed by Raza Husain. It is urged that we must accept the acquittal of Sheo Prasad by this Court as evidence that the charge against him was untrue, that therefore Har Prasad could have had no knowledge

of Maiku and no notice to send for him and threaten him.

In the first place Sheo Prasad was by this Court given the benefit of the doubt which had entered the mind of the learned Judge who heard the appeal. There was by no means an honourable acquittal, if one may use the term. The man was convicted by the Judge who saw and heard the witnesses. Sheo Prasad no doubt is entitled to the benefit of the acquittal that he secured. We have had the advantage of seeing and hearing the witnesses in the present matter on the point to which they have testified and I personally have no hesitation in believing and accepting that evidence. I am not leaving out of view the atmosphere of intrigue in Banda and the connection of Raza Husain with the case, but I cannot accept that as alone sufficient ground for refusing to weigh the evidence and for rejecting it. It is good ground for close scrutiny and care. There is good and reliable evidence before me in addition to the evidence of Maiku and Sarju Singh. The 2nd charge is supported by the evidence of Ram Nihore alone. I have already related the manner and occasion on which he made his complaint to the Magistrate on 1st October and the nature of the charge. Babu Har Prasad Singh has denied it in toto on oath. It is true that some 14 years ago Ram Nihore was convicted of robbery and sentenced to two years' rigorous imprisonment. He explains this by saying that there was trouble between him and a Police Officer in which the latter was injured on the head and as a result he was prosecuted and imprisoned. The man however is leading a respectable life as a contractor and pays incometax. He gave this evidence quietly and easily and in a very convincing manner.

It is no doubt a case of oath against oath, but there are reasons which to my mind show that Ram Nihore's statement is not the result of collusion or conspiracy. He is not a person who is mixed up as far as I can see with the factional strife of Banda. He lives in a house which stands alone at the gate of the Railway Station at Manikpur, many miles from Banda. He no doubt visits the latter place from time to time on business. The suggestion is that he enters into contracts in partnership with one Dhani Ram who was also a witness in

Sarju Singh's case, and Dhani Ram is said to be a friend of Sarju, who, of course, is hostile to Har Prasad Singh. Nothing has been placed before us to show that Dhani Ram and Ram Nihore are on such familiar terms with Sarju that Ram Nihore would agree to conspire and lend himself to a false charge against Har Prasad Singh. Again if Ram Nihore's statement is false and the result of conspiracy, the conspiracy must have been hatched and action settled very promptly within two days. Har Prasad Singh and Prag Dat set out for Allahabad from Banda on Saturday 29th. They had to change at Manikpur where they had to wait for two hours or more. Assuming conspiracy, this fact would have to be discovered and Ram Nihore at Manikpur consulted and won over and prompted to make his false statement before he was examined as a witness on 1st October. This, of course, is not quite impossible but highly improbable. The time was very short, unless a brilliant idea struck some one who had learnt of Har Prasad's presence at Manikpur and thought it a good opportunity of making up a false case against the learned pleader. Nextly Ram Nihore on 1st October named two other persons as having been present when he was intimidated, viz., Ganesh Prasad and Harbans Prasad, one of whom was sometimes employed by him. These persons, assuming a conspiracy, would hardly have been named unless the conspirators were sure of them. Neither of these men has been called by either side in the present case. The Government Advocate states that they have refused to testify. Ram Nihore's statement was made to the Magistrate far too early to fit in with the suggestions of a conspiracy.

He personally had no motive to invent the story. As against him, it is urged that he volunteered the statement after his evidence in Sarju Singh's case had been recorded. I can see nothing in this to cause the slightest suspicion. From my experience as a Magistrate and a Judge for over 30 years I know that this is the usual way in which witnesses appeal to the Court for protection when threats have been held out to them, and one knows how often witnesses are intimidated especially, if influential persons are concerned. The Pleader has called three witnesses to support his statement

that while at Manikpur on Saturday afternoon 29th, September 1917, he did not leave the platform, viz., Shah Said Ullah, the reader in the Court of the Session and Subordinate Judge, the Sub-Assistant Surgeon (or Hospital Assistant) of the Banda Jail and Prag Dat, the warder of the Jail and the complainant in Sarju Singh's case. Their story is that they travelled in the same train to Manikpur on their way to Allahabad in company with Har Prasad Singh. Said Ullah travelled with him in the same compartment. They all waited on the platform together in front of the refreshment room and the only occasion on which they lost sight of Har Prasad was when he crossed to the waiting room on the opposite platform to answer a call of nature which took him about 10 or 12 minutes. I think it is correct to say that these three witnesses created a very unfavourable impression on all the Judges who constitute this Bench.

The reader Said Ullah was no doubt going home for the lower Court's vacation. He returned to Banda at the end of October. He was present in Banda on duty when the Magistrate Mr. Rizwi took action against the leading Pleader practising in the Courts. It is said that the Magistrate's Court was filled with the members of the Bar. The knowledge of what had occurred must have spread rapidly and those persons connected with the Courts, especially the Judges' readers must have learnt of it at once. Har Prasad has himself admitted that this must have been so. Yet Said Ullah would have us believe that he had not the slightest inkling that action was being taken against Har Prasad or the nature of the accusation that was being made against him until a week afterwards. And he does so, in order to explain the reply which he wrote to a letter written to him on 6th, November 1917, by Har Prasad Singh. In his letter Har Prasad wrote to the following effect. (The original is in vernacular):

"You perhaps remember that you and I on September 29th went together from Banda to Allahabad in the same compartment at Manikpur. You and I sat on chairs in front of the refreshment room all the time till the train arrived. Please write down and let me know what you remember. I shall be grateful."

There is no explanation in the letter of the reason why the request was made

In reply Said Ullah wrote a detailed account of what he remembered, even mentioning the 10 or 12 minutes during which Har Prasad went to the waiting room and not forgetting to state that otherwise they did not leave each other's company for a second and he ended as follows: "But what need has arisen for you to make this inquiry? The facts are such that you know all about them yourself." The man must have been fully aware of the charge that had been preferred and I have no doubt that this letter and its reply have been made up by the trend of them to lend an air of truth and credibility to the witnesses' evidence. No doubt these witnesses travelled by the train but there was no good reason for them to keep so close a watch on the movements of Har Prasad Singh during the weary waiting of over two hours. Said Ullah says that after replying to the letter he went to Court, met Har Prasad Singh, questioned him and learnt for the first time what was happening and that he would have to give evidence. He is a member of Har Prasad's club — The George Coronation Club. He admits that the matter of Har Prasad's case was not such that he ordinarily would not hear of it for a week. He must have heard all about it. The Courts must have been ringing with the names. He is the Judge's reader. I have no hesitation in holding that this letter is a piece of manufacture. Ram Nihore's house is about 200 paces from the platform, and it would not have taken more than a few minutes to go there and return. The sub-Assistant Surgeon Abdul Shakur Khan was a shifty witness whose demeanour created a very unfavourable impression. He was taking his wife and family to Allahabad and he during the long wait located them in a side verandah of the refreshment room where they were screened from observation, being pardashin, and admittedly from time to time he had to attend to them. Yet he is positive that Har Prasad was not out of his sight for more than two or three minutes at a time except when for 10 or 12 minutes he, Har Prasad, went to the waiting room. He was very positive, and it is curious how both he and Saidullah give the same estimate of the time occupied by the absence in the waiting room. This man was also one of Prag Dat's witnesses in the case against Sarju Singh

in which Har Prasad appeared for the prosecution. He testified to a confession of guilt which he said Sarju had made in his presence when he tried to settle matters with Prag Dat. When pressed he finally had to admit that he would not swear positively that Har Prasad did not leave the platform for 10 minutes, but thinks that he did not do so. Prag Dat's statement is to the same effect. In his cross-examination he showed up badly. He fenced with the questions put to him and was evidently doing his best not to tell the truth. Of course the case against Har Prasad must be judged on the merits of the evidence produced against him, and not by the weakness of the defects in the evidence he has produced in his defence. He summoned a number of witnesses but examined only the above four persons. I have discussed the evidence against him and considered it and all the pleas taken on his behalf and I have no hesitation after full consideration in accepting that evidence and in holding that both charges have been established to my satisfaction.

The charges are serious. This class of offence, the intimidation and tutoring of witnesses, is only too common. In the ordinary individual it is bad enough. In the case of a member of the legal profession it is a far graver offence. It is unnecessary to dilate upon this. It shows that the vakil is unfit to be a member of the honourable profession to which at present he belongs. The fact that he has in his defence produced evidence of a highly suspicious character, like the letter of 6th November 1917, goes to show that his idea of the honour of his profession and its true standard of morality is a very low one. The production of such evidence in his case is sufficient in itself to disqualify for the Bar. I would remove his name from the list permanently and direct him to deliver up his certificate forthwith to the Registrar of the Court.

A plea of good previous character is made and certain certificates have been put forward. Against this must be set off the fact that this pleader has once before been called upon (on the report of the Subordinate Judge) to show cause why this Court should not deal with him. He was the pleader engaged in a Civil suit and purchased the property attached and sold in execution of his client's decree in his father's name. He broke a very old

and salutary rule of the Court the breach of which has been laid down to be professional misconduct. He pleaded that he acted under impulse and urged want of experience and previous good character (he was then of some five years standing). He was then let off with a warning. The man is astute and clever and has risen to local fame, but the charges against him are so serious that I can see no other alternative to striking him permanently off the rolls. The defect in his character is far too serious for leniency. This is entirely apart from the somewhat bad character given to him by the District Magistrate.

Abdul Raoof, J.—After much anxious thought I have come to the same conclusion at which my learned brother Tudball has arrived. I have had the advantage of perusing his exhaustive judgment and I find myself in full agreement with him on all the points. I shall state my reasons briefly. The facts on which these proceedings are based, came out in a most natural way in the course of the trial of a criminal case, King Emperor through *Prag Dat v. Sarju Singh*. Mr. Har Prasad appeared for the prosecution in the case and Ram Nihore and Mahomed Siddiq, a Police Officer, were among the defence witnesses. The former stated at the close of his examination, after being sworn a second time, that Har Prasad had approached him at Manikpur where he had gone on his way to Allahabad and had asked him not to give evidence for the defence threatening him at the same time with unpleasant consequences if he did not listen. It was argued that this incident had no bearing on the trial of the case, it was unnecessarily brought in with the object of implicating Har Prasad, and that it should not therefore be taken notice of. If the story of the threat was true, in my opinion it was quite natural that Ram Nihore should have brought it to the notice of the Court in the hope of getting some protection from it. The statement cannot be discredited merely on this ground. No reason has been suggested as to why Ram Nihore should have come forward to injure Har Prasad, excepting that a vague suggestion was made that he was a partner of Dhani, a friend of Sarju Singh, the accused person in the criminal case in which Har Prasad had appeared as a *vakil* for the prosecution against him. In the cross-examination

an attempt was made to show that he was a man of no substance and that he had been convicted once for robbery and it was argued that he was therefore not a reliable witness, but this took place about 14 years ago. He is now carrying on the business of a thekadar and it is not shown that he is not leading a respectable life. To meet his evidence, three witnesses have been examined on behalf of Har Prasad, viz., Shah Saidullah, peshkar of the Court of the Subordinate Judge of Banda, Abdul Shakur, Sub-Assistant Surgeon attached to the Banda Jail, and Prag Datt, his client in the above-mentioned criminal case, who were his fellow-travellers on the same date, i. e., 29th September 1917, and by the same train. By their evidence it is sought to establish a sort of alibi. The gist of their evidence is that Har Prasad in their company remained all the time at the Manikpur Railway Station waiting for the Allahabad train and that he never absented himself from their view.

They all state that he went out of their sight for 10 or 12 minutes only, when he went to the privy with a *lota* in his hand. They give the minutest details of his movements at the station. No reason is given as to why they should have kept such a close watch over him for more than 2 hours, and why they should have carried all these details in their memory all this time. It is difficult to believe this evidence. It bears the stamp of exaggeration and untruth. In the course of the same trial, Mahomed Siddiq, a Police Officer, in his cross examination disclosed that one Maiku alias Langra, a weighman of the Banda Bazar, was witness for the prosecution in a previously decided case in which the Municipality of Banda had prosecuted one Sheo Prasad, a girdawar, for criminal breach of trust, and his Pleader, Mr. Har Prasad, had sent for the witness at his house and tried to persuade him not to give evidence for the prosecution. Through the intervention of Sarju Singh whose aid the police had secured, this attempt had failed.

This is a separate charge brought against the Pleader and Maiku, Ejaz Husain, Sarju Singh and Mahomed Siddiq have been called as witnesses on behalf of the Crown. Maiku states that one evening at about 7 or 8 he was sent for by Har Prasad through a man whose name he did

not know and was asked by him under threat, not to give evidence for the prosecution. He was subjected to a lengthy cross-examination and he stood the test well. He gave his evidence in a frank and easy manner and so far as his demeanour went, he left a favourable impression on my mind. Har Prasad's counsel attempted to establish by the cross-examination of this witness that he had not been even near the house of Har Prasad, much less inside of it, and that therefore he was a tutored witness. I think the result in the cross-examination was quite the contrary. No discrepancy of any importance has been pointed out in his evidence but it has been urged that, as Sheo Prasad was eventually acquitted in appeal by the High Court and the evidence of Maiku was unfavourably criticised by the learned Judge who decided the appeal, his evidence in this case should not be acted upon.

It is however clear from the judgment that a doubt was created in the mind of the learned Judge, who gave the benefit of the doubt to the accused and acquitted him. There was no positive finding that the charge was absolutely untrue and the evidence was false. It may be that socially he does not occupy a very high position in life, but supported, as his evidence is, by other corroborative evidence and circumstances. I see no reason to disbelieve it on the main point. The witness Ejaz Hussain, who happened to arrive the same evening and at the same time in the office of Har Prasad, overheard the talk which the pleader was having with Maiku. We are asked not to believe this witness, because he is dismissed servant of Kashi Nath, a client of Har Prasad, under whose advice he had been dismissed, and therefore bore ill-will towards him. Kashi Nath has been called as a witness on behalf of the pleader to establish the theory of dismissal, but the impression left upon my mind about his evidence was that it rather went to establish quite the reverse. His letters, produced by the Crown, coupled with his answers in the cross examination went to show that the man was still in his service and was trusted by him, although an unpleasantness had arisen for a time on account of the non-delivery of certain village papers which had resulted in a registered notice calling upon him to give up the papers. The address on the envelope and the contents of the letter, dated 27th August 1917, show that Kashi Prasad still

utilized his services as a "Karinda." In this letter he asked him to come to Banda, as he was acquainted with the facts of a certain case. He stated in his deposition that he had gone to Har Prasad on the above-mentioned evening about some business of his master, but on being cross-examined on the point, he was unable to give the particulars of that business.

Kashi Nath is a big zamindar holding many villages and it may be presumed that he must have had many cases in which he might have been interested at one time or the other. Ejaz Hussain might have gone to Har Prasad in connection with one of these cases. He cannot be expected to remember the particulars of the case at this distance of time and I do not think that his evidence must necessarily be discarded on account of his inability to give the details. The conversation which Har Prasad was carrying on with Maiku at the time was of an unusual character and it was not strange that Ejaz Hussain should have retained the incident in his memory. The notice and the reply to it given by Ejaz Hussain were read out to us. He was not charged in it with any serious dereliction of duty and certainly it contained not even a hint of dismissal. Most of the papers demanded from him were subsequently delivered over by him. The reply to the notice to my mind gave a valid reason for not handing over the papers to the man sent by Kashi Prasad. I cannot believe that Ejaz Hussain has come forward to give false evidence against Har Prasad for the reason suggested. After all, it is merely an inference which we are asked to draw, and I for my part do not think that the evidence affords any ground for such an inference. The inference suggested is too far-fetched and I refuse to disbelieve the evidence on the above ground.

It is however argued that the name of Maiku as a witness in Sheo Prasad's case was mentioned at a very late stage, i. e., not until the case had come before the trying Magistrate, that therefore Har Prasad could not have come to know that he was an evident or even a possible witness in the case. This argument ignores the fact that Har Prasad had been engaged at the very commencement to represent Sheo Prasad at the inquiry held by the Commissioner appointed by the Municipal Board and must be taken to have come to know all the necessary

facts relating to the purchase of bad grain from Sheo Nath. It is difficult to understand that a man of Har Prasad's intelligence and experience would not have tried to find out all the possible evidence which would be produced against his client in any subsequent proceedings. We are however asked to believe that his interest in the matter had ceased after the inquiry by the Commissioner had come to an end, and he had no more to do with it until he was again employed by Sheo Prasad to defend him before the trying Magistrate. Having regard to the fact that the prosecution had been started by the Municipality, in which every one connected with the affairs of the Municipal Board must have taken more than a usual interest, it is unlikely that Har Prasad had no further concern with it after the proceedings before the Commissioner. Although there is no positive evidence on the point, it is easy to infer from the circumstances that he must have continued to advise his client Sheo Prasad in the matter all through and must have come to know that the man who had weighed the grain was at least a possible witness for the prosecution. As proved by the evidence of Har Prasad and other witnesses, there have been and even now there are two factions in the town of Banda among whom party feeling has been running high. Har Prasad belongs to one of these parties and the other party is headed by one Mir Raza Husain. It is argued that the present proceedings have been engineered by the party of Raza Husain with a view to bring about the discomfiture and the utter ruin of Har Prasad. Here again there is no positive evidence on the point and we are simply asked to draw this inference from the circumstances that Mir Raza Husain has all along been taking a prominent part in prosecuting the case against him and in fact in this Court also he has been present all the time during the hearing instructing the counsel for the Crown. There may be some truth in it, but were it not for the fact that at times agencies do spring up which help the arm of malice in reaching the offender, many an offence would have remained undiscovered and the offender would have gone unpunished. Unless it is shown that the evidence given is untrue and therefore ought not to be believed, I am not prepared to attach any weight

to this argument. Can the mere fact that some of the enemies of Har Prasad have taken a prominent part in helping the Crown in this proceeding, justify us in rejecting the positive evidence which has been given against him? If Muhammad Siddiq and Sarju Singh are to be believed their evidence fully supports the statements made by Maiku and Ejaz Hussain. Muhammad Siddiq has no connexion with Banda now and the defence has not succeeded in proving by any positive evidence that he is or has ever been under the influence of Raza Husain. He gave his evidence in a very satisfactory manner and there is no valid reason for disbelieving him. Sarju Singh may be said to be somewhat mixed up in the affairs of the two parties at Banda, but his evidence in this case, supported as it is by the statement of Muhammad Siddiq who may be described as an independent witness, cannot be discredited on this ground alone.

In my opinion both the charges against Har Prasad have been fully established. As regards the evidence for the defence I am fully convinced that it is manufactured and wholly unreliable and Har Prasad has only aggravated his offence by producing such evidence before the Court.

By the Court.—The order of the Court is that Har Prasad be removed from practice as a vakil. He is further ordered to hand up to his certificate to the Registrar of the High Court to be cancelled.

V.B./R.K. Vakil removed from practice.

A. I. R. 1918 Allahabad 152

BANERJI AND RYVES, JJ.

Gordhanlalji and others—Judgment-debtors—Appellants.

v.

Maksudan Ballabh — Decree-holder—Respondent.

Execution First Appeal No. 112 of 1918
Decided on 30th May 1918, from a decree of Sub-Judge, Muttra.

: Civil P. C. (1908), O. 21, R. 32—Decree for injunction is to be executed as provided by O. 21 R. 32—Execution cannot be effected through Police—Decree passed with regard to hereditary office binds legal representatives.

A decree for a perpetual injunction was passed in favour of the plaintiffs and the defendants third party, restraining the defendants second party from interfering with the right of the plaintiffs and of the defendants third party to perform the "Singar Arti" ceremony in a temple. The legal representatives of the defendants se-

cond party caused an obstruction to the performance of the ceremony by the defendants third party, and the latter applied for execution of the decree through the Police:

Held (1) that the decree having been passed both in favour of the plaintiffs and of the defendants third party, the latter were entitled to execute it; (2) that if the defendants second party disobeyed the order of the Court, they were liable to the penalties mentioned in O. 21, R. 32 which prescribed the manner for the execution of a decree for injunction and that the Court had no power to order the Police to see that the decree-holders performed the ceremony without obstruction by the defendants second party; (3) that as the suit was brought by the plaintiffs on the basis of a right which they claimed as the descendants of the founder of the temple, the injunction was granted against the defendants not as individuals but as persons claiming a right as descendants of the original founder and that therefore the decree could be enforced against their legal representatives also.

[P 153 C 2; P 154 C 1]

Shiam Krishna Dar—for Appellants.

Narain Prasad Asthana—for Respondent.

Judgment.—This appeal arises out of an application for the execution of a decree passed on 17th December 1906, in a suit brought by one Goswami Manohar Lal against a number of defendants of whom the appellant Pearey Lal is one. Certain persons who were alleged to have the same rights as the plaintiffs were made defendants of the third party, one of these defendants being the present applicant for execution Goswami Maksudan Ballabh. A decree was made by the Court against all the defendants of the first and second party with the exception of one Kishori Lal, declaring that the plaintiff and the defendants of the third party were entitled to perform the "Singar Arti" ceremony in a certain temple both on ordinary and festive occasions. The decree also ordered a perpetual injunction to issue restraining the defendants of the first and second parties from obstructing the plaintiff and the defendants third party from performing the duties of the office claimed by them. The present application was made by Goswami Maksudan Ballabh, who is one of the defendants of the third party, against Goswami Gobardhan Lalji, the grandson of Prem Lal, who was defendant 1, and Goshain Girdhar Lalji and Goshain Gourdhan Lalji, the sons of Goshain Munna Lal, who was one of the defendants of the second party, and Pearey Lalji who, as we have said above, was also a defendant of the second party.

It is stated on behalf of the decree-holder that these defendants are now interfering with the performance of the duties appertaining to the office which was claimed in the suit and which was decreed to the plaintiff and the defendants of the third party. Their prayer as contained in the application, is that the decree may be enforced through the Superintendent of Police of Muttra in this way, that on the dates mentioned in the application he (the Superintendent of Police) may have the "Arti" performed by the decree-holder-applicants, and that the defendants may be directed not to interfere with the performance of those duties.

The application was opposed on several grounds, but the objections were disallowed and the application as made was granted by the Court below. In this appeal which has been preferred by the judgment-debtors, the first contention raised is that Goswami Maksudan Ballabh is not entitled to apply for execution as he was not one of the plaintiffs to the suit. This objection was raised in the Court below and was, we think, rightly disallowed. The decree was made in favour not only of Manohar Lal but also of the defendants of the third party declaring their right to perform the duties of the office claimed by them at certain hours every day and also on festive occasions. The decree thus declared the right of, amongst others, the present applicant Maksudan Ballabh and the injunction decreed was also an injunction in his favour. He is therefore entitled to maintain the present application.

The next contention put forward on behalf of the appellants is that the decree was personal to the persons in whose favour it was made and could only be enforced against the individuals who were defendants to the suit, and not against persons who are their legal representatives. This contention also is in our opinion, without force. It appears that the suit was brought on the basis of a right which the plaintiffs claimed as descendants of one of the founders of the temple and that the defendants were also made parties as such descendants. The plaintiffs claimed to have the right to perform certain offices which, the defendants contended, they themselves had a right to perform. So that the decree re-

lated to a hereditary office which the plaintiffs claimed, and in regard to which their claim was resisted by the defendants. The injunction was also granted against them not as individuals but as persons who claimed a right as descendants of the original founder of the temple. The appellants, who after the death of some of the defendants in the former suit, have taken their place—or claim to have taken their place—are thus persons against whom the decree may properly be executed so far as the injunction goes. We may mention that this plea was not put forward in the Court below and it therefore did not become necessary for that Court to consider it.

The third contention is that the application is time-barred. As the decree was one for a perpetual injunction limitation would run from the date of breach of the injunction, that is, from the date on which the defendants disobeyed the injunction—that date was within three years of the present application. Consequently no question of limitation arises in the present case, as held by the Court below. It is lastly urged that the Court below was wrong in ordering the Superintendent of Police of Muttra to see that the "Arti" was performed by Goswami Muksudan Ballabh and that the defendants offered no obstruction. So far as this part of the prayer in the application for execution is concerned, we do not think that the Court below ought to have granted it. It had no power under the Code of Civil Procedure to order the Police to interfere in the matter. There being a decree for a perpetual injunction against the defendants or those whom they represented, it was the duty of the defendants to carry out the injunction, that is to say, to refrain from offering any obstruction to the performance of the office which was decreed to the decree holder. If they disobeyed the order of the Court they were liable to the penalties mentioned in O. 21, R. 32, of the Code, but the Court could not order the police to see that the decree-holders performed the duties of their office without interference on the part of the defendants. If a breach of the peace was apprehended, that was a matter for the Magistrate and the Police, and not for the Civil Court. We accordingly set aside that portion of the lower Court's order which directs the Superintendent

of Police to order the Sub-Inspector of Bindrahan to have the applicant Muksudan Ballabh perform "Singar Arti" in the temple.

We are also of opinion that the Court had no power to appoint a Commissioner to see that the decree-holder performed without obstruction the duties appertaining to his office. This portion of the lower Court's order, which was passed on a subsequent date, should also be set aside. In our opinion Cl. (5), R. 32 does not authorize the Court to make these orders and provides for a different state of things. We accordingly vary the order of the Court below by directing that an order do issue to the defendants-appellants forbidding them to interfere with the performance of the duties of the decree holder namely, "Singar Arti" every day on festive days in the temple of Radha Ballabhji. If the defendants-appellants fail to obey the injunction, it will be time for the decree holder to make a proper application in the terms of O. 21, R. 32. We direct the parties to bear their own costs of this appeal.

V.B./R.K.

Decree varied.

A. I. R. 1918 Allahabad 154

PIGGOTT AND WALSH, JJ.

Bharatpur State—Plaintiff — Appellant.

v.

Secy. of State—Defendant — Respondent.

First Appeal No. 376 of 1915, Decided on 29th April 1918, from decree of Sub-Judge, Muttra.

Wajibularz—Entry in—Value of—Resident in village dying without heirs—Zamindar and not Crown held entitled to site and house by grant—Escheat.

A sahuakar, who was the owner and occupier of a house situate within the limits of Mauza S and also within the limits of the town of G, died without leaving heirs and the Secretary of State took possession of the house and its site as the ultimate heir to the property of a deceased person. The plaintiff claimed the site as the zamindar under the Settlement of 1850, by which the Government had conferred upon him revenue-free proprietary rights over the soil of Mauza S, and asserted that the deceased was owner only of the materials of the house with a right of residence therein but had no right to transfer the site or the right of residence. The wajibularz of the mauza provided that residents of the mauza and no proprietary rights in anything except the materials of the houses, that they could not sell the site or the right of residence in the sites and that in the event of the death of an occupier of such a house, without legal heirs, the proprietor of the mauza would be entitled to possession of

of the office which was decreed to the decree holder. If they disobeyed the order of the Court they were liable to the penalties mentioned in O. 21, R. 32, of the Code, but the Court could not order the police to see that the decree-holders performed the duties of their office without interference on the part of the defendants. If a breach of the peace was apprehended, that was a matter for the Magistrate and the Police, and not for the Civil Court. We accordingly set aside that portion of the lower Court's order which directs the Superintendent

the house along with the site. The defendant contended that the house in suit, being situated within the limits of a town, was not subject to the ordinary law governing the relations between occupiers of houses and the ground landlord in the inhabited sites of agricultural villages:

Held: (1) that unless the defendant could show that the effect of the Settlement of 1850 was not to grant to the proprietor in the mahal in the village any substantial rights of ownership in respect of what was described in the papers of that settlement as the abadi appertaining to the mahal, the defendant could not successfully maintain that the residents possessed anything more than a limited interest in the houses occupied by them or in their sites. [P 158 C 2]

(2) that upon the evidence, as between the parties to the suit, it must be held that the plaintiff had successfully discharged the burden of proof which lay upon him and that the deceased did not possess an absolute interest alienable at his will and pleasure in respect of the property in suit but merely a limited interest which could not be the subject of escheat to the Crown.

[P 158 C 2]

Motilal Nehru and Baldeo Ram Dave—for Appellant.

A. E. Ryves—for Respondent.

Piggott, J.—This is an appeal by an unsuccessful plaintiff, the Bharatpur State, against the Secretary of State, in which the plaintiff's claim was for possession of a certain house. The house in question was admittedly situated within the limits of a village known as Mauza Sakitra. Without going further into the arguments which have been addressed to us on the point, I am content to say that I accept the argument of the defendant-respondent to the effect that it is also situated within the limits of the town of Gobardhan. The last owners and occupiers of this house mentioned either in the plaint or in the written statement were two persons of the name of Dip Chand and Mansa Ram, who were sahu-kars by profession and resided and carried on business in the said house. It is common ground that both these persons are now dead and have left no heirs entitled to inherit their property. The defendant, acting through the Collector of Muttra, has taken possession of this house and its site in assertion of his claims as ultimate heir to the property of a deceased person. The plaintiff's claim is that he is the owner of the site on which the house stood, that Dip Chand and Mansa Ram were no doubt the owners of the materials of the house and had a right of residence therein, which could have descended to their heirs if any. Nevertheless, according to the plaintiff's case Dip Chand and Mansa Ram had no transfer-

able interest in respect of the site or the right of residence thereon, and were therefore in respect of this house merely the owners of a limited interest. With regard to the question of law on which this claim is based there has been no argument before us. Both parties are agreed that the law on the subject is correctly laid down in the case of *Tulshi Ram Sahu v. Gur Dayal Singh* (1).

It is conceded on behalf of the defendant-respondent that if Dip Chand and Mansa Ram possessed in respect of the property in suit merely a limited interest then this interest of theirs could not be the subject of escheat to the Crown and the claim of the plaintiff as owner of the soil cannot be resisted. The case for the defendant however is that the house in suit, being situated within the limits of a town, is not subject to the ordinary law governing the relations between occupiers of houses and the ground landlord in the inhabited sites of agricultural villages in these provinces, and that as a matter of fact Dip Chand and Mansa Ram could have sold the house in suit at any time with the right of occupation and residence and that the purchaser would thereby have obtained a good title, which could not have been contested by the Bharatpur State. The plaintiff has rested his case mainly upon two sets of documents, the settlement papers prepared in the year 1850, which are printed at pp. A-14—A 23 of our record, and secondly, a certified copy of the *wajibularz* or Record of Rights of Mauza Sakitra prepared at the settlement of 1877 A. D.

The learned Judge of the Court below has found that, on a true interpretation of the terms of that *wajibularz* the custom intended to be laid down is that all residents in houses situated within the limits of Mauza Sakitra, even though their houses may form part of the town of Gobardhan, have no proprietary right in anything except the materials of the houses, they cannot sell the site, or sell the house along with a right of residence on the said site; and in the event of the occupier of such a house abandoning the same, or dying without legal heirs, the proprietor of Mauza Sakitra, that is to say, the Bharatpur State, will be entitled to possession of the house along with its site. Nevertheless the learned Subordinate Judge has come to the conclusion

1. (1911) 33 All 111=7 I C 231 (F B).

that the custom thus stated in the wajibularz of 1877 is not correctly stated and is not a custom binding as between the parties to this litigation. He says that the document in question as it stands is not a record of custom at all but merely a claim preferred on behalf of the proprietor of the Bharatpur State by his agent.

It does not purport to have been signed by any person representing the interests of Dip Chand and Mansa Ram, would not have been binding upon them and would not even have formed a particularly strong piece of evidence against them, in the event of litigation between the Bharatpur State and any transferee of theirs. From this the Court below has gone on to hold that the conditions laid down in this document are not binding on the defendant and that, in view of other evidence on the record, it must be taken to be proved that Dip Chand and Mansa Ram, along with all other residents in the town of Gobardhan, possessed an absolute right of transfer in respect of the houses occupied by them. On this ground the Court below has affirmed the right of escheat claimed by the Secretary of State as defendant and has dismissed the plaintiff's suit. In the memorandum of appeal before us a point is taken as to the alleged wrongful exclusion of certain documentary evidence by the trial Court, but it has been admitted in argument that this plea cannot be pressed. For the rest, the appellant's case is that he is entitled to succeed under the terms of the village Record of Rights and that, failing this, he would, in any event, be entitled to succeed on the ground that he is the proprietor of the site and must be presumed to possess in respect of any house standing upon his land the ordinary rights of proprietors of agricultural lands in respect of the inhabited sites appertaining to the mauzas of which they are the owners.

A great deal of the argument before us at the hearing of this appeal was devoted to the question whether this Mauza Sakitra, or more especially the particular mahal of Mauza Sakitra in which the disputed house is situated, was or was not to be regarded as a purely agricultural village. The most important documentary evidence on this point is to be found in the Settlement Papers of the year 1850, to which reference has already been made. It appears that in that year

the land of Mauza Sakitra was settled by Government with the Bharatpur State in a somewhat peculiar manner. The village was divided into two mahals of 15 biswas and of 5 biswas, of which the former alone was assessed to revenue. With regard to the smaller mahal of 5 biswas a revenue free grant was made in favour of the Bharatpur State, subject only to certain small payments on account of road cesses and chaukidari dues or local police charges. The papers before us contain a complete description of the land appertaining to this revenue-free mahal of 5 biswas. I note more particularly that the cultivated area of this mahal amounted to a little less than 41 per cent of the whole that even if the land described as "old fallow" be added to the cultivated area, the total of the two comes to barely over 53 per cent of the whole. Almost 22 per cent of the entire area consists of groves and the rest is made up of thoroughfares, inhabited sites, tanks and unculturable land.

Taking this description of the land along with the oral evidence, by which it is fully established that the inhabited site of village Sakitra forms, and has long formed, an integral part of the town of Gobardhan, I should be quite prepared, if the case turned upon it, to hold that the house in suit was not situated upon land forming part of the inhabited site of an ordinary agricultural village, so as to make the principles laid down by this Court in respect of the proprietorship of land in such village sites applicable in themselves to the land now in suit. What impresses me, however on the other side is that this is a litigation between the owner of Mauza Sakitra and the Government, that is to say, the very authority which granted to him revenue-free proprietary rights over the soil of this 5 biswas mahal of Mauza Sakitra. I take it from the defendant's own case that in the year 1850, when this grant was made the only inhabited site appertaining to Mauza Sakitra consisted of houses, shops and the like which formed part of the town of Gobardhan. Nevertheless Government took a portion of this town and, treating it as the inhabited site or abadi of Mauza Sakitra, granted it to the Bharatpur State as forming part of the revenue free mahal of 5 biswas in the said mauza. Presumably Government meant something by making this grant

and by including in the area so granted that portion of the town of Gobardhan in which the house now in dispute is situated. In an agreement which was taken from the Bharatpur State at the Settlement of 1850 a number of details are given regarding the inhabited area included in the 5 biswas mahal.

It is stated that there is a katra, or large enclosure, in which there are a number of houses or shops, which have been constructed by the proprietor of the land, that is to say by the Bharatpur State, that all the other houses at that moment standing have also been constructed by the same and that the Bharatpur State is not merely the owner of the soil but the owner of all the houses and of the aforementioned katra standing in the abadi belonging to the 5 biswas mahal. It is asserted that the proprietor has every right in respect of the same and that, as regards the waste land then in existence, no one will be entitled to build upon it without his permission. The agreement in question appears to have been propounded by a duly authorized agent on behalf of Maharaja Balwant Singh, Raja of Bharatpur, and it is endorsed as having been accepted and ordered to be placed upon the record. At the subsequent Settlement of 1877 A. D., an elaborate paragraph was drawn up and inserted in the Record of Rights of Mauza Sakitra regarding the inhabited land appertaining to the village. This shows that there was no other inhabited site appertaining to the said village except that portion of the town of Gobardhan, in which the house now in suit is situated. Nevertheless it was provided that if the cultivators whether possessing occupancy rights or tenants at will, and also the riaya, or tenants generally have built any houses, cattle sheds or other enclosures on this abadi site, their rights in the same are limited to the materials. They can sell the materials if they like, but not the site; and the meaning of these provisions I take to be that they have no transferable right of residence. There are other provisions in which more general words are used such as "bashind-gan" (residents) and in which the word asami is used for tenant in place of riaya. In this connexion it is expressly provided that, if any "asami" dies without an heir the house occupied by him will pass to

the Bharatpur State as proprietor of the site. The question of the interpretation of these provisions has been before the Courts on other occasions. A good deal of reliance is placed on behalf of the defendant-respondent on the result of a litigation which took place in the year 1906.

The judgment is printed at p. 6 of the book before us and in this judgment reference is made to the result of a previous litigation of the years 1874-75. Broadly speaking, it is sufficient to say that in this former litigation individual residents in the town of Gobardhan and in that part of the town which forms the abadi of the 5 biswas mahal of Mauza Sakitra succeeded in asserting against the Bharatpur State, the present plaintiff, a right to sell their houses together with a right of residence in the same. The decision in the suit of 1906 proceeds upon a certain interpretation of the provisions of the wajibularz of 1877, according to which those provisions are limited in their application to agricultural tenants. In the present case the learned Subordinate Judge has refused to accept that interpretation. He holds that the words in the wajibularz, as they stand, are wide enough to include all residents (bashind-gan) in houses situated on the abadi in question. The point has been argued again before us, but I feel no hesitation in agreeing with the interpretation put upon this document by the Court below. I think the word "riaya" in itself is very general and is intended to extend the provisions in question to persons other than the occupancy and non-occupancy cultivating tenants spoken of immediately before. I think also that the word asami is wide enough, especially in this particular context, to include all residents of the abadi, even though not cultivating tenants or even agriculturists. What has determined the decision of this case in the Court below has been the evidence of a number of instances in which residents of houses situated within the area in suit that is to say, within abadi of the 5 biswas Mahal of Mauza Sakitra, have exercised a right of transfer in respect of their houses along with the right of residence in the same. In two of the instances already referred to, the rights of the tenants in question were affirmed against the Bharatpur State after litigation. Evidence has also been given of at least four instances

in which on the death of the owner or occupier of a house within the area in question without leaving any heir, the right of escheat was successfully asserted on behalf of the Crown, apparently without any opposition by the Bharatpur State.

Moreover as the learned Subordinate Judge correctly points out the evidential value of such a document as this wajibul-arz of 1877 as against occupiers of houses within the area in question at the time when this document was drawn up is not great. There is nothing in the document itself to show that any inquiry was made from these persons as to whether the rights recorded in favour of the proprietor of the soil, and to the prejudice of themselves, in this document were admitted by them to exist. The case however seems to be altogether otherwise in a litigation in which the contesting party is the Secretary of State for India in Council, that is to say, the Government itself. The Government made the original grant of this 5 biswas revenue free mahal in the year 1850; and if it did not intend to convey to the grantee, namely, the Bharatpur State, in respect of that portion of the site of the town of Gobardhan which was inclosed in the mahal of 5 biswas of Mauza Sakitra, the ordinary rights of a proprietor of an agricultural village in the inhabited site of such a village, it is difficult to see what rights it intended to confer by the grant of the particular area forming this inhabited site. It accepted at the time from the representative of the Bharatpur State a document which expressly admitted full ownership on the part of the said proprietor in respect of all existing houses on the abadi in question and recognised the justice of his claim that no one should in future build any house upon the unoccupied land appertaining to the said abadi without permission. Then at the Settlement of 1877 a Record of Rights was drawn up under the direction of Government and included in the Settlement Papers, in which as I hold the right now claimed by the plaintiff in respect of the land in question is once more recognised. I do not wish to complicate what seems to me a tolerably straightforward case by suggesting that these Settlement Papers of 1850 and 1877 can be used so as to estop the Government, that is to say the defendant in this suit, from asserting that the papers in

question were incorrectly prepared and that the rights acknowledged in these papers in favour of the plaintiff never in fact existed. I think however that it is very difficult for the defendant to get round these documents, otherwise than by proving some definite case of adverse possession on the part of the deceased owners though whom the defendant claims. It is not suggested that any case of this sort can be set up. On the evidence as it stands, as between the parties to this present suit, I think it must be held that the plaintiff has successfully discharged the burden of proof which lay upon him and that Dip Chand and Mansa Ram did not possess an absolute interest, alienable at their will and pleasure, in respect of the property now in suit, but merely a limited interest which cannot be the subject of escheat to the Crown.

The Full Bench case of this Court *Talshi Ram Sahu v. Gur Dayal Singh* (1), to which reference has already been made was a case of the devolution of a fixed rate tenancy; but the arguments there used seem to me to apply with a great deal of cogency to the facts of the present case. I would almost go so far as to say that unless the defendant can show that the effect of the Settlement of 1850 in favour of the Bharatpur State was not to grant to the proprietor of the 5 biswas Mahal in village Sakitra any substantial rights of ownership in respect of what was described in the papers of that settlement as the abadi appertaining to this mahal, the defendant in the present suit cannot successfully maintain that Dip Chand and Mansa Ram possessed anything more than a limited interest in the house in question and in its site. Practically it seems to me that in taking possession of this house the defendant is derogating from the grant made in 1850 in favour of the Bharatpur State. The fact that there have been 3 or 4 other instances of similar encroachments on the part of the defendant, which have not been contested by the plaintiff, cannot take away from the plaintiff rights in respect of the land now in suit, if those rights are sufficiently established, as I hold them to be by the plaintiff's documents of title, namely the Settlements Records of 1850 and of 1877. In my opinion, therefore we must accept this appeal set aside the decree of the Court below and decree the plaintiff's claim as

brought with costs throughout including in this court-fee on the higher scale.

Walsh, J.—I think this is a clear case. Mr. Motilal Nehru's arguments on the document of September 1850 is well founded. That document seems to me consistent only with the existence at sometime or another of an old agricultural village, and it is clearly proved that this house was in that village. The indications of an agricultural village, unless I am much mistaken, are overwhelming. Village customs, uncultivated land, a former settlement and field maps are referred to from time to time. Fairs are said to take place. There are no village expenses but the Raja's Karinda manages the village. The income from sewai items is taken by the weighmen on behalf of the Raja. No taxes are fixed but blankets are taken from the shepherds every year and various contributions in kind are raised from a carpenter, a blacksmith and a barber. The duties of the chamars are elaborately defined; and the whole thing seems to me to contain overwhelming internal evidence of the character of the collection of houses, and of the cultivated and uncultivated lands, with which it deals. The corresponding khasra speaks of the tenants residing in the village, including the carpenter already referred to and by a singular coincidence a person of the same name, carrying on business as a bania, who bears a suspicious resemblance to the person through whom it is suggested that the Government are now entitled to escheat. This person's house is in a Katra (which I understand to be whether in village or in town, a nondescript collection of every kind of house) in this village and I am satisfied that the house in question, which it is admitted on the part of the Government is 100 years old, was situated in that Katra at that date. The map is even more significant.

It shows the position of the tank which has been much spoken of and of the serial No. 1, and it also shows what, I am satisfied, at that date was the south-east boundary of this abadi where it abutted upon the town of Gobardhan. I think the judgment of the Court below, reading between the lines, proceeded upon the assumption that this was really common ground as the case was contested in the Court below. It is perfectly clear that the point now relied upon on behalf

of Government was not specifically raised by the defence and that para. 3 of the defence, which contains the real contention of the Government, dealt with the class of the property or class of occupier, and not with the geographical situation of the building. The wajib-ul-arz has been dealt with by my brother. I accept his construction of the words which I do not myself profess to understand, but if this is correctly translated it would clearly bear the meaning which has been put upon it by the learned Judge in the Court below. The view I take about these documents is this; not that they are necessarily binding on the Government, not that the Government could not prove by affirmative evidence that the real state of facts was something quite different, or that there is any estoppel, but that as against the Government they contain entries which the Government must be taken to have accepted as an accurate record of the then existing state of facts. They raise a very strong presumption of fact and they get rid of the difficulty which so constantly attends the discussion of the meaning of wajib-ul-arz in this country when no body is left alive to testify to the true facts, and each contending party relies on something or another tending either to strengthen or to qualify the effect of the wajib-ul-arz. The plaintiff therefore starts with what I may call a trump card. The Government Advocate attempted to get rid of the effect of this piece of evidence in two ways, firstly, by the description and history of the condition of the town of Gobardhan contained in the Gazetteer; secondly, by the evidence of sales and dealings largely coming from the side of the plaintiff and admittedly quite inconsistent with the plaintiff's case. Assuming for the moment that every statement in the Gazetteer is correct and that we are entitled to take judicial notice of its contents as facts established without other proof, it seems to me that every one of them is quite consistent with the plaintiff's case.

They do not speak in the present tense of the existing conditions from an earlier date than 1884 but I will assume, as appears to be the fact, that there was always in or about this tank, which has great historical associations and great attractions for itinerant pilgrims, a town which through the growth of pilgrimage, commerce, fairs and so forth and through

local development, generally called progress, has overrun and in substance, so far as identity is concerned, submerged its humbler neighbours. Towns in England, I do not know if it applies to India, frequently owe their development to people who wish to live near them and not in them. Everything points to the remains of this village having been submerged in the superior growth and development of the old town which apparently was originally only a neighbour. However that may be, I agree with the contention made on behalf of the appellant that once it is established that rights of this kind to property have existed they cannot be affected by a change in the character of the neighbourhood only. I think the sales to some extent admitted on the plaintiff's side, and for the rest proved by the defendant's witnesses, are quite intelligible upon the same footing. In facts in a conglomerate neighbourhood of this kind it is not unnatural to find instances entirely inconsistent with one another within a very short distance. The Government Advocate said that there was really no evidence on behalf of the plaintiff of any similar transaction to that which he is setting up in this case. I think in that respect he was wrong. There is no documentary evidence and it is certainly surprising that the plaintiff has failed to produce any. But there is positive and direct evidence of a considerable amount given by the plaintiff's vakil or Agent, or Pleader, whoever he may be, of possession by the plaintiff Raja, which it is alleged has been recovered under similar circumstances to those relied on by the plaintiff in this case. Nothing would have been easier for the Government than to give direct evidence contradicting these allegations. In the absence of some evidence I think it must be taken to be proved that the Raja as zamindar has, in previous cases in this abadi, resumed possession of houses which apparently were not occupied by persons who could be correctly described as agricultural tenants.

I always speak with hesitation about questions of custom because there are few questions about which misconception so easily arises. It seems to me that this case at any rate is a question of contract between the original zamindar and the former occupiers of this property, and the question of what that contract was is one which we are called upon to presume in

the absence of direct evidence about it. But if it does turn upon a question of custom, the learned Judge of the Court below has found in favour of the plaintiff in spite of everything that has been said in support of the contrary by the Government Advocate. The learned Judge of the Court below rightly said that the plaintiff was bound to prove the existence of the custom if he relied upon it, and went on to hold that it did exist, and then by an unfortunate misdirection, for which I can find no explanation in the judgment instead of giving effect to that finding, went on to say that:

"the general customary law of escheat to the zamindar no longer holds good in Gobardhan".

If that means anything it means what Mr. Motilal argued is not the law, namely, that owing to the changed condition of the neighbourhood the former rights of the zamindar have been lost. That ground is clearly fallacious and I see no other ground upon which the decision for the defendant can be supported. I agree therefore with my brother that this appeal must be allowed.

By the Court.—We allow this appeal, set aside the decree and order of the Court below and decree the plaintiff's suit with costs in both Courts.

V.B./R.K.

Appeal allowed.

A. I. R. 1918 Allahabad 160

PIGGOTT AND WALSH, JJ.

Surendra Nath Mukerji—Appellant.
v.

Emperor—Opposite Party.

Criminal Application No. 215 of 1918, decided on 15th April 1918, from order of Sess. Judge Allahabad, D/-21st March 1918.

(a) Evidence Act (1872), Ss. 27, 28—Statement made to police leading to discovery of fact deposed, proved by deposition of officer taking down statement—Defence is entitled to require production and proof of record made at Police Station.

Accused went to a Police Station and made the report, "I have killed my wife and her corpse is lying in my house", in consequence of which the police, proceeding to his house, discovered the corpse of his wife in an inner room of the house:

Held, that under S. 27 the officer who had taken down the statement of the accused was entitled to depose that the accused came to him at the time and place stated and said: "I have killed my wife and her corpse is lying in my house", and that in consequence of that statement the woman's corpse was discovered as indicated by the accused but that when this had been deposed by the prosecution, the de-

fence were entitled to require the production of the record made at the Police Station and to insist upon proof of the whole of that record.

[P 162 C 1]

(b) Evidence Act (1872), S. 25—No evidence of offence except confession—Confession must be taken as a whole.

Per Walsh, J.—Where there is no evidence of offence except a confession, the confession must be taken as a whole. The Court cannot select, from the only evidence which it is proceeding to act upon, in order to find the crime established as a fact at all, portions which it rejects as untrue and treat the balance which remains as truthful evidence.

[P 165 C 2]

(c) Criminal Trial—Defence should not be called upon to frame a theory.

In a criminal trial it is not desirable to call upon the defence to frame a theory either at the beginning or at any other stage of the hearing, particularly in a case of difficulty in which the theory of the prosecution itself is not clear.

[P 166 C 2]

C. R. Alston—for Appellant.

A. E. Ryves—for the Crown.

Piggott, J.—On the 3rd December last, somewhere about 2 o'clock in the day, a young Bengali, Surendra Nath Mukherji, whose age is given in the record as 22 years but who according to his father's evidence was not yet quite 20 years of age, presented himself at the Kotwali Police Station at Allahabad and made a certain report, a record of which was entered in the Police register provided for the purpose. In consequence of this report the City Inspector, Muhammad Said, proceeded at once to the house in the city in which the said Surendra Nath Mukherji was living. He found the door leading into the inner apartment locked and it was opened with a key produced from his person by the above mentioned accused. The latter then led the way to a certain room on the north-east side of the courtyard which was fastened on the outside by a chain. He unchained this door and led the Police Officer and certain witnesses, one of whom, Bande Husain Khan has been called at the trial, into the room. On the floor was lying the corpse of a young girl named Sunilabala Debi, wife of Surendra Nath Mukherji aforeaid. As to the age of this girl there is some little conflict of evidence, but we shall not be far wrong if we take it to have been about 15 years. She was quite dead and was wearing only a bodice and a loin cloth. Some part of this loin-cloth was in some way drawn together or heaped up under the back of the neck. There was a slight cut or incision on the great

toe of each of the feet, and with reference to these the accused made a statement and produced from a recess in the same room an implement with which he said those incisions had been made. The corpse was subsequently examined by Mr. Kashi Nath, Assistant to the Civil Surgeon of Allahabad.

With regard to the incisions above spoken of Mr. Kashi Nath was quite satisfied that they had been inflicted after death, and this is in accordance with the statement to which the accused himself has adhered throughout. The only other external mark of injury was a slight redness of the skin on the left side of the neck. This was evidently a mere patch, described in the Assistant Surgeon's evidence as $1\frac{1}{2}$ inch long into $\frac{3}{4}$ inch broad. A further examination of the corpse disclosed that death was almost certainly due to asphyxiation, but beyond this the Assistant Surgeon was not prepared to go. He was asked a number of questions as to the possibility of death by strangulation or death by suffocation and as to the presence or absence of indications tending to prove that this suffocation, or strangulation, or whatever it was, had been in its nature either homicidal or suicidal. The general effect of his evidence seems to me to be to leave those questions absolutely open. In one portion of his evidence the Assistant Surgeon seemed to incline towards the belief that death had been caused by suffocation rather than by strangulation, though he admitted himself to be puzzled by the absence of any marks of external injury about the mouth or nose. At the very end of his examination after he had protested that he was unable to give any decisive answer on the question of strangulation or suffocation, he told the Court that on the whole strangulation by means of a soft cloth seemed to him more in conformity with the post mortem appearances than any other theory.

This is in itself an opinion expressed with much doubt and reserve: it is not altogether consistent with other portions of the evidence given by the same witness. It is difficult to understand how, on the theory of strangulation effected in this manner, the only mark left upon the neck should have been the small red patch already referred to. On the evidence, moreover, it would seem that what is ordinarily the most characteristic symp-

tom of death by strangulation, namely, the protruded tongue, was entirely absent. Surendra Nath Mukherji was eventually put on his trial on the charge that he had murdered his wife. Of the assessors who heard the evidence one finds him guilty and the other not guilty. The learned Sessions Judge finds him guilty and has passed sentence of death. The record is before us for confirmation of that sentence and we have had the advantage of hearing the petition of appeal presented on behalf of the convict argued by Mr. Rose Alston. The evidence on the record is admittedly most scanty. At the very outset of the trial a question arose as to the admissibility in evidence of the statement recorded at the Kotwali Police station at 2.30 p. m. on December 3rd. The learned Sessions Judge was at first disposed to reject that statement as inadmissible by reason of the provisions of S. 25, Evidence Act. Later on upon further consideration of the provisions of S. 27 of the same Act, he has allowed it to be put in evidence. I have no doubt that the provisions of both these sections apply to the circumstances stated and require to be considered.

A mere statement in evidence by the City Kotwal that the accused came to the Police Station and made a report, in consequence of which the corpse of his wife was discovered in an inner room of his residential house, would be calculated to work unfairly from the point of view to the prosecution and from that of the defence; S. 27, Evidence Act, was no doubt introduced on purpose to obviate the possibility of such unfairness. Under that section the City Kotwal was unquestionably entitled to depose that Surendra Nath Mukherji came to him at the time and place stated and said: "I have killed my wife, her corpse is lying in my house," and that in consequence of this statement the woman's corpse was discovered as indicated by the accused. Now when once this much had been deposed to on behalf of the prosecution, the defence were clearly entitled to require the production of the record made at the time at the Kotwali Police Station and to insist upon the proof of the whole of that record if they thought it advisable to do so. I think that the statement should have been put in evidence in this manner at the request of the defence; but as the case stands, I see no reason to object to its

appearance on the record and I find it necessary to consider it in some detail. According to this statement the accused reported that his wife had been seriously misconducting herself for sometime past and that she had been carrying on an illicit correspondence with another man. For this reason, the statement says, the accused made up his mind to kill her.

He arranged that he should be alone with her in the house at about noon on the day in question. He had spent the night in remonstrating with her and continued to do so; but her only reply was "leave me alone: I want to go away." Thereupon the accused tied her loin cloth round her neck and killed her, after which he inflicted the two incisions on the great toes already spoken of. With regard to these the explanation given in the statement is that the accused had heard that persons strangled by means of a piece of cloth would come to life again. On the following day, 4th December 1917, the accused having spent the night in police custody, was placed before a Magistrate of the First Class, to whom he made a confession. We have before us the record of that confession and also the evidence of Mr. S. E. Anthony, the Magistrate who took it. According to Mr. Anthony as soon as he began to question the accused and before he had even completed the preliminary questions which a Magistrate always puts in these cases, the accused interrupted him by saying: "I have killed my wife."

The confession itself adds very little to this bald statement. It repeats the allegation of unchastity against the girl in terms, and adds that the accused had obtained possession of letters written by her to some other man. For this reason he says, he murdered her by strangling her with the dhoti she was wearing. After the enquiry preliminary to commitment the accused was again examined by the same Magistrate on 21st December 1917. He then declined to answer most of the questions put to him and claimed his right to reserve his defence for the Sessions trial. To the Sessions Judge the accused said that he had gone out on the morning of December 3rd and returned about 11 o'clock to find the house door shut and no answer returned to his knocks. He then climbed over one of the walls and in the closed room already spoken of found his wife lying dead with her own loin cloth tied round the

neck. He unfastened the cloth and, in the attempt to discover whether life was quite extinct, inflicted the cuts on the toes which have already been referred to.

He came out of the house, locking the door behind him and told one Tarak Nath Mukherji, a telegraph singaller, what had happened. On the advice of the latter he first sent a telegram summoning his own father, who was in Calcutta at the time, and then went to the police station intending to report that his wife had committed suicide. He alleged that, somewhere inside the police station, before he went upstairs to the room where the City Inspector Mohammad Said was sitting, he entered into conversation with some subordinate police clerk, who strongly advised him not to report that his wife had committed suicide but to say that he had killed her out of jealousy on account of her misconduct. He says this Munshi gave him further reasons for adopting this course and that, after he had gone upstairs, the City Kotwal also urged him not to be afraid, but to say that he killed the woman and that he would get off all right. He ascribed his subsequent confession to the Magistrate to police influence. He now denied having killed the girl, asserting that he was very much in love with her. He said, further, that she had attempted to commit suicide on other occasions. The defence evidence was mostly directed to this point; but the telegraph signaller Tarak Nath Mukherji confirmed the accused's statement so far as it concerned him.

Two physicians, Dr. Nogendra Nath Datt and Nanak Prasad Varma, a homoeopathic practitioner, gave evidence that they had attended the girl on two different occasions after what appeared to be attempts on her part to commit suicide by poisoning. Evidence was also given of an occasion on which it was said the accused's wife had left her house declaring her intention of drowning herself in the Jumna river. The evidence of the accused's father, Benod Bohari Mukherji, and of a neighbour, Nimai Charan Mukherji, suggests further that the girl was of a wilful and hysterical temperament, that she would resort to hunger-striking and to beating her head on the ground if her will was crossed in any way. I have set out the evidence for the defence in the

first instance because there is really no further evidence for the prosecution beyond that already indicated. A younger brother of the accused's was called, but he gave no evidence particularly relevant to the case, except that in cross-examination he supported the allegation for the defence as to previous attempts to commit suicide. The record before us suggests that the prosecution intended in the first instance to produce certain further evidence, and more particularly that witnesses who were present at the discovery of the corpse were to be examined as to statements made by the accused at that time and as to a certain pantomime gone through by him, in illustration of the manner in which he had compassed his wife's death. It is not clear whether this part of the prosecution case was dropped because those responsible for the conduct of the case were satisfied that there was no substance in it, or because it was supposed that evidence of this nature could not be given without contravening the provisions of S. 26, Evidence Act. The evidence is certainly not before us and I only allude to it because of this latter possibility.

I think that the witnesses were entitled to depose to any actions performed by the accused in their presence and, after they had done so, the defence would have been entitled under other provisions of the Evidence Act to put questions (if they deemed it advisable) as to any words used by the accused which accompanied or explained those actions. If any evidence of this sort was available I can only say that in so difficult a case, I feel some regret that it is not before me. The learned Sessions Judge in finding the accused guilty has proceeded upon a line of reasoning which sounds convincing enough, if all the premises assumed by the learned Sessions Judge are granted. He takes it that the case must necessarily have been either one of suicide or one of wilful murder. He comes to the conclusion that the evidence as a whole and more particularly the statement of the Assistant to the Civil Surgeon, considered along with appropriate passages in certain medical treatises to which the Court was entitled to refer under the proviso to S. 60, Evidence Act, practically excluded the possibility of suicide. Holding, therefore that the fact of murder is established beyond question the learned Sessions

Judge finds that even apart from the accused's retracted confession, the circumstances as a whole point to the accused as the only possible murderer. The confession itself, as made before the Magistrate on 14th December, the learned Sessions Judge evidently regards as clinching the matter. In considering the soundness of the conclusion thus arrived at, I wish to take up first two questions of detail. The whole of the evidence for the defence has been swept aside by the learned Sessions Judge on what appear to me quite inadequate grounds. It is true that most of the persons concerned are relatives, caste fellows or friends of the accused, although it is not clear that these remarks apply to the physician Nanak Prasad Verma. The matters to which these witnesses were required to depose were matters which could only have been within the knowledge of relatives or close friends of the family. It is not logical to put aside evidence of this sort, merely on the ground that the persons giving it have a motive for desiring to befriend the accused person.

No doubt, as the learned Sessions Judge remarks, the fact that this unhappy girl had attempted to commit suicide on previous occasions would have but little bearing on this case, if it be indeed proved beyond possibility of doubt that the present case was not one of suicide. Nevertheless the defence evidence as a whole does suggest to my mind certain conclusions which I regard as established with reasonable certainty. I accept it as proving that this child wife was of a self-willed disposition and hysterical temperament. I think it highly probable that she had, on previous occasions, either actually made, or professed to make, some attempt to take her own life. Further than this I do not desire to press the defence evidence, nor do I think it necessary to do so. Now as regards the medical evidence, I feel bound, although with some reluctance, to comment on the absence of certain details which I should have desired to find there. In a case of this sort where a human life is at stake, no motives of delicacy however natural or in themselves commendable, can be allowed to interfere for a moment with any attempt to sift out the truth. Speaking on the basis of an experience which goes back for a considerable number of years, and which calls to my mind more than one case analogous to the pre-

sent in some of its most important features, I take it upon myself to say that in all cases in which the supposed victim of a murder is a young girl, the Medical Officer conducting the post mortem examination should invariably make a thorough and careful examination of the organs of sex. In the present case we have it that the parties had been married for about a year and according to the evidence they had been separated for almost six months of that time. It appears not very probable that the medical examination, if directed expressly to this point, would have proved that this unhappy girl was at the time of her death a *virgo intacta*; but if this had happened to be the case, it would have thrown a most important light upon the consideration of the entire evidence. Even apart from this possibility, it might have disclosed some evidence bearing upon one conceivable view of the case which has been entirely kept out of sight at the trial, but which I think it impossible altogether to overlook.

Subject to these preliminary remarks, I now come to close quarters with the main grounds upon which the judgment of the Court below has proceeded. It is fairly established on the evidence that the present case is either one of suicide or of wilful murder, and moreover is the hypothesis of suicide absolutely excluded by the evidence? It is not a matter about which it is possible to enter into any course of detailed reasoning. The question is as to the inferences to be drawn from the evidence of the Assistant to the Civil Surgeon considered in the light of any standard authorities on medical jurisprudence. Speaking for myself I can only say that, on the evidence as it stands I think that the theory of suicide, although shown to be somewhat improbable, cannot be said to be definitely excluded. I would go further and say that, in the case of a young girl of this age and of such antecedents and temperament as I believe to be proved by the defence evidence, the possibility of death by accident, or by some undiscovered natural cause, is not altogether excluded. There remains yet another possibility at which I have taken it upon myself to hint in an earlier portion of this judgment. To put the matter bluntly, assuming that this girl met with her death at a moment when she was alone in a certain room with her husband, I

should not even then be satisfied that the accused had caused her death by inflicting any injury upon her with such guilty intention or such guilty knowledge as would be necessary to support a charge of culpable homicide. The possibility would remain that he had been resisted in an attempt to exercise his marital rights, resisted perhaps with cries and screams, and in an attempt to stifle those cries he had used more force than he realized and driven a nervous and hysterical child into death by suffocation, without any intention of producing such a result or knowledge that he was likely to do so. The most curious and exceptional feature of this particular case is to be found in the two cuts inflicted upon the feet after death. I am quite unable to believe that a man who had deliberately murdered his wife would inflict these curious post mortem injuries for any such motive as that suggested in the statement taken down at the Allahabad Kotwali. If he merely wished to make sure that his victim was dead, he could have used a cutting implement to better purpose in a great variety of other ways. I feel confident that the explanation subsequently offered by the accused of these injuries is the true one, namely, that he was trying desperately to see whether there was not some life left in the apparently inanimate body. It is at least possible that he suspected the girl was shamming death and intended to put that to the test.

This brings me therefore to the final question. We are asked to convict this young man of murder, substantially upon a retracted confession and to do this in a case in which, putting that confession on one side, there is not, in my opinion, definite proof that murder has been committed at all. I should feel in any case most reluctant to act upon a retracted confession under such circumstances. In this particular case I feel no hesitation in going a good deal further. Parts of the confession in question I definitely disbelieve. I do not believe the reason given in the statement recorded at the Kotwali for the cuts inflicted after death on the feet. I do not believe the imputations on the chastity of the unfortunate girl thrown out either in this statement or in the confession subsequently recorded before the Magistrate. Practically I come back to this. Disbelieving so much of the confession, am I prepared to feel

satisfied beyond the possibility of doubt that the accused was speaking the truth when, at the outset of his statement before the Magistrate on the 4th December he began by saying: "I have killed my wife?" To this my answer is, firstly, that I am not satisfied beyond all doubt that the accused was speaking the truth when he said this. If he had been induced by injudicious advice, no matter from what quarter that advice may have proceeded, to tamper with the truth in other portions of his statement, he may not have been speaking the truth when he uttered these words. Secondly, as I have already pointed out, I might be prepared to believe that the accused truly said that he had killed his wife, and yet hold that in doing so he had not committed the offence of murder, or even that of culpable homicide. I am satisfied as the case stands that the conviction and the sentence recorded in the Court below cannot be affirmed and that, on the materials on this record, the appellant cannot be convicted of any lesser offence.

Walsh, J.—I agree that this appeal must be allowed. I have formed no theories about the case, but if I had to direct a jury I should feel myself compelled to tell them, not as a matter of law but as a matter of common sense, that upon the mysterious condition of the evidence in this case it was their duty to give the defendant the benefit of the doubt. As I have said before, and I repeat it because I think it is sound and indeed I think what my brother has said is in accord with it, that when a confession is the only evidence, that is to say, when there is no evidence of the crime except the confession relied upon, you must take the confession as a whole, that is to say, you cannot select, from the only evidence which you are proceeding, act upon in order to find the crime established as a fact at all portions of it which you reject as untrue and treat the balance which remains as truthful evidence. This does not seem to me a principle of law so much as a statement of sound reason and logic, and few cases could afford a better illustration of it than the present case. There are two statements in the confession, namely, the adultery by the deceased girl with other men and the existence of love letters written by her, the first of which is in the highest degree improbable and the second of which is demonstrably

untrue; but they are so completely involved in the confession itself as to my mind to constitute the confession a piece of testimony which no reasonable man would act upon in the ordinary affairs of life in a business of his own. The Judge has I think unfortunately treated this retracted confession and the explanation given for its original utterance as being necessarily an attack upon the Police. He says, "it is no doubt a retracted one but for all that it is singularly free from suspicion." He further says:

"it was made in the presence of a Police Officer who is above suspicion in the matter of bringing any pressure to bear upon the accused."

In the sense in which the Judge used the words "free from suspicion," I agree with him. Where I differ from him, and I think it was a fatal misdirection, is in drawing the inference from that conclusion that the confession itself is necessarily true. It is quite consistent with all the facts of the case and with the confession itself that the accused was persuaded to make it voluntarily in his own interest, and was honestly supposed to be doing it in his own interest by the person who prompted him. I am inclined to think that the confession in that sense was quite voluntary and I accept the evidence of Mr. S. E. Anthony about it. But it is perfectly consistent with that hypothesis that nonetheless the confession was false as indeed it has been shown to be to a large extent. There is one unsatisfactory feature about the trial and the way in which the conclusion was arrived at. There is great doubt, even mystery, upon the medical testimony and the appearance of the body as to how the death was caused at all. In the calendar two witnesses were vouched and sent up to the trial for the purpose of proving that the accused had illustrated the manner in which death had been caused. It may be, I do not stop for the moment to enquire that it is not open to us now to look at that evidence but it is part of the history of the prosecution and it is impossible for me to shut my eyes, in a case of this importance to the fact that either because a doubt existed as to its legitimacy as evidence or as to its trustworthiness the point was deliberately abandoned by the prosecution. It is an elementary principle of criminal law and certainly should be applied in a case of this gravity and difficulty that the accused

is entitled to the benefit of any point such as this which was essential to the questions which lay at the root of the enquiry which had been put forward and subsequently abandoned by the prosecution. A further difficulty in the case to which my brother has already referred, and which has been entirely overlooked in the decision of the case is the bearing upon what really happened of the cuts inflicted on the deceased woman's toes after death.

The judgment reads in some particulars like a category of grievances against the accused and his friends. It cannot be too often repeated because it ought always to be remembered and I think in this case it was forgotten that there is all the difference between a trial of a criminal case where a man's life is at stake and a civil suit. It is not desirable to call upon the defence to frame a theory either at the beginning or at any other stage of the hearing particularly in a case of difficulty in which the theory of the prosecution itself is by no means clear and whether there was any misunderstanding or not, Mr. Ross Alston, if he did refuse, was perfectly within his rights in declining to accept the invitation. I feel bound also to say that it is due to the father of the accused to whom this case must in any view have been a source of great anxiety and who obviously was in a position of considerable difficulty in the witness box to say that in my opinion without having heard anything suggested against his demeanour at the trial and after reading his evidence over and over again he gave it with candour and freedom from any trace of dishonesty. He dealt in detail with the conversations which he had with his son and with the vakils who were advising at that critical moment in the defence but as far as I can see the evidence which he gave was as I have said candid and straightforward and I do think that some better reason should have been given for throwing over the whole of his testimony than the mere fact that his name was Mukherji.

The telegram the absence of which is commented upon, is now in our hands. It has been produced by Mr. Ross Alston. There is one very curious feature about it which only shows the importance in a case of difficulty of probing every clue, and this is the duty of the police as far as possible. Certainly before 2 o'clock if not considerably before, the accused was

at the Kotwali and from that moment remained in the custody of the Police. His witness says that the conversation about sending the telegram took place about 1-30. The telegram itself states officially that it was handed in at the Allahabad Telegraph Office at 12 minutes past 3. We are now informed that that hour relates to some transaction inside the office. The statement on the form is that the time was noted at the moment when it was handed in at the telegraph office. Therefore the inference to be drawn from the telegram itself is either that it was handed in at a time when the accused was in the custody of the police or that there is great remissness in the telegraph office with regard to the entries of these matters. It is impossible to say that cases may not and do not often occur, when the time and day of an act done, recorded accurately and officially becomes of vital importance in an enquiry and if the practice is in the post office to enter as the hour for handing in a telegram something which is two hours wide of the mark the sooner that practice is abandoned the better. The entry ought to be accurate and made in ordinary language either in English or the language which is used for the telegram so as to be readily understood by any person of ordinary intelligence without consulting a Code. This is a side issue but it does so happen that the point has not actually been cleared up in the evidence. I agree that the conviction must be quashed.

By the Court—We accept this appeal, set aside the conviction and sentence in this case acquit the appellant Surendra Nath Mukherji of the offence charged and direct that he be forthwith released.

V.B./R K. *Conviction set aside.*

A. I. R. 1918 Allahabad 167

PIGGOTT AND WALSH, JJ.

Ant Ram—Plaintiff—Appellant.

v.

Mithan Lal and another—Defendants—Respondents.

Second Appeal No. 149 of 1916, Decided on 2nd November 1917, against decision of Sub-Judge, Muttra, D/- 7th December 1915.

Provincial Small Cause Courts Act (1887), Art 41—Decree for maintenance against one of three brothers making him liable for whole amount—Payment by defendant made

liable—Suit to enforce contribution held not excepted by Art. 41.

A Hindu widow sued the brothers of her deceased husband for maintenance and obtained a decree. For certain reasons the decree made one of the defendants expressly liable for the whole amount of the decree. The latter made payments under the decree and then sued the other defendants for contribution :

Held: that under the peculiar circumstances of the case the fact of his having made payments under the decree gave rise to an equity in favour of the plaintiff as against the defendants, but that nevertheless the suit as brought could not be treated as a suit for contribution within the meaning of Art. 41 and was not therefore excluded from the cognizance of a Court of Small Causes. [P 168 C 1]

Per Walsh, J.—It is only suits for contribution of a peculiar and special character which are included in the exemption contained in Art 41 and a litigant who wants to bring himself within the exemption must clearly establish that his suit in every respect complies with the very precise definition contained in the article. [P 168 C 2]

Narain Prasad Asthana—for Appellant.

M. L. Agarwala—for Respondents.

Piggott, J.—This is a second appeal by a plaintiff, whose suit to recover from the two defendants, his own brothers, a sum amounting to Rs. 340, after having been decreed by the Court of first instance has been decreed in part only by the lower appellate Court. The sum covered by this appeal is Rs. 190. On behalf of the defendants-respondents a preliminary objection was raised to the effect that the cognizance of this appeal is barred by S. 102, Civil P. C. We have to determine whether the suit brought by the plaintiff Ant Ram was or was not one of a nature cognizable by a Court of Small Causes. It was a simple claim for money to an amount falling short of Rs. 500 and therefore fell within the cognizance of a Court of Small Causes, unless excluded by some article in Sch. 2, Provincial Small Cause Courts Act (9 of 1887) There is really one article alone (Art. 41) about which there can be any substantial argument. Something has been said about Arts. 38 and 42, but they are so clearly inapplicable that we need not mention them further. On behalf of the applicant it is contended that the suit in question is a suit for contribution and that it was brought by himself, either as a sharer in joint property in respect of a payment made by him of money due from a co-sharer, or in the alternative made by him as a manager of joint property on account of the said property. As a matter of fact the question raised by this preliminary

objection is one which we should have to consider in one form or another at the hearing of the appeal itself, because the only question decided against the plaintiff has been one of limitation, and in order to determine the question of limitation it would be necessary to determine the nature of the suit as brought. We have come to the conclusion that the preliminary objection must prevail, as the suit in question is not a suit for contribution at all within the meaning of Art. 41 aforesaid and cannot be held to be concerned with joint property within the meaning of that article. The somewhat peculiar circumstances out of which the litigation arises need not be gone into at length.

The essential point is that a decree was passed on 15th February 1910 against all the three brothers who were parties to the present suit in favour of Mt. Basanti, the widow of a previously deceased brother. The object of that decree was to secure to this lady maintenance at the rate of Rs. 10 per mensem chargeable on the whole of the property which had belonged to the father of the three defendants. In consequence however of certain antecedent circumstances which need not be gone into, the Court thought fit to include in its decree an express direction that the present plaintiff Ant Ram should alone be liable for the payment of the money. The consequence of this is that the liability of the property and therefore liability of the remaining defendants could not come into existence in the event of failure on the part of Ant Ram to comply with the terms of the decree. We do not think there is any getting away from the fact that, at the time when he made the payments which formed the basis of his cause of action, Ant Ram alone was liable to make them under the terms of the decree. No doubt, under the peculiar circumstances, the fact of his making these payments gave rise to an equity in his favour as against his two brothers, and this equity has been recognized by the decree passed in the Courts below. The fact remains nevertheless that the suit as brought cannot be treated as one for contribution and therefore was not excluded from the cognizance of a Court of Small Causes. For authorities on this point it is sufficient to refer to two judgments of the Madras High Court *Mavula Ammal v Mavulu Maracoir* (1)

1. (1907) 30 Mad 212.

and *Ramaswamy Pantulu v. Naryana-moorthy Pantulu* (2). We were referred in argument in the other side to a case of this Court *Fatima Bibi v. Hamida Bibi* (3) but that case is fully reconcilable with the Madras authorities and indeed proceeds on the same principles of law. What the learned Judge of this Court who decided that case laid stress upon was that the liability which the plaintiff had satisfied was a joint liability as between himself and the defendants at the moment when the payment was made and moreover, a liability attaching to a joint tenancy and therefore attaching to property jointly held by the parties to the suit. It was therefore a suit for contribution in the full sense of the word. We hold accordingly that no second appeal lies in this case and we dismiss this petition of appeal accordingly with costs including fees on the higher scale.

Walsh, J.—I entirely agree. One thing is quite clear, that it is only suits for contribution of a peculiar and special character which are included in this exemption. If what is ordinarily known as a suit for contribution was intended to be exempted nothing would have been easier than to say so. I think it must be taken that a litigant who wants to bring himself within Art. 41 must clearly establish that his suit in every respect complies with the very precise definition.

V.B./R.K. *Appeal dismissed.*

2. (1904) 14 M L J 480.

3. (1915) 28 I C 578.

* A. I. R. 1918 Allahabad 168

KNOX AND WALSH, JJ.

Maha Ram and others—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 873 of 1917, Decided on 26th February 1918, from order of Addl. Sess. Judge, Mainpuri, D/- 17th September 1917.

(a) **Christian Marriage Act (1872) — Construction**—Care must be taken that no one is brought within Act who is not within its express language.

Per *Knox, J.*—The Christian Marriage Act has to be so construed that no case be held to fall within it which does not fall both within the reasonable meaning of its terms and within the spirit and scope of the enactment. No violence must be done to its language in order to bring people within it but rather care must be taken that no one is brought within it who is not within its express language. [P 169 2; P 170 C 1]

(b) Interpretation of Statutes—Extension of words.

It is not competent to a Court to extend the words of an enactment by construction.

[P 170 C 1]

(c) Christian Marriage Act (1872), S. 68—S. 68 must be interpreted in harmony with context.

The interpretation to be placed upon the words of S. 68 must be one which harmonises with the context and promotes in the fullest manner the policy and object of the legislature. [P 170 C 1]

(d) Christian Marriage Act (1872), Ss. 68 and 3—No one except person professing christian religion comes within purview of S. 68.

The word 'means' in S. 3 is an inclusive term and therefore no one except a person who professes the Christian religion, comes within the purview of S. 68 of the Act. [P 170 C 2]

*** (e) Christian Marriage Act (1872), S. 3—Person professing christian religious—Who is not illustrated.**

Per *Knox, J.*—A person is not a 'person professing the Christian religion' within the meaning of Act 15 of 1872, simply because he is baptised as an infant, when he has no possibility of saying to the world what is the faith to which he belongs, nor can any importance be attached to the fact that he attends a Christian school. The dressing as a Christian especially in the Bhangi class is not conclusive on the point either. [P 171 C 2; P 172 C 1]

A person cannot be said to profess the Christian religion if at the time of his marriage he performs *devi ka puja*. [P 171 C 1]

Per *Walsh, J.*—A person, who on the eve of his marriage resists all pressure and persuasion to be married as a Christian by a Christian ceremony and who having by birth and connexion other religious associations deliberately decides to marry a sweeper according to sweeper rites and does public worship to Hindu gods in the presence of his relatives and friends, is not 'a person professing the Christian religion' within the meaning of S. 3. [P 172 C 1]

(f) Christian Marriage Act (1872), S. 68—Whether S. 68 is intended to penalise marriages not under the Act—*Quære*.

Whether S. 68, Act 15 of 1872, was intended to penalise marriages other than those intended to be or purporting to be marriages under the Act (*Quære*). [P 172 C 1]

(g) Evidence Act (1872), S. 115—Principle does not apply to criminal law.

The principle of estoppel has no place in the criminal law and the idea of a Christian by estoppel is a contradiction in terms. [P 172 C 2]

(h) Christian Marriage Act (1872)—Object is not to prevent people marrying as they wish.

The object of Act 15 of 1872 is not to prevent people marrying as they wish but to enable them to protect themselves and their posterity by a lawful and binding marriage if they wish to be married as Christians. [P 172 C 2]

(i) Christian Marriage Act (1872), S. 68—Christian can marry non-Christian by non-Christian ceremony.

There is no express prohibition preventing a professing Christian from doing violence to his faith and marrying a non-Christian by a non-Christian ceremony. [P 172 C 2 P 173 C 1]

(j) Christian Marriage Act (1872), Ss. 4 and 68—It is not criminal for Christian to marry by ceremony void under S. 4—Scope of S. 68.

Section 68 does not make it criminal for a professing Christian to marry by a ceremony which is void under S. 4 of the Act. [P 173 C 1]

It refers to a class of persons who solemnize or profess to solemnise a Christian marriage under the Act not being authorized by S. 5 to do so.

[P 173 C 1]

Nihal Chand and Baleshwari Prasad—for Appellants.

A. E. Ryves and R. K. Sorabji—for the Crown.

Knox, J.—Maha Ram, who described himself as son of Kallu, by caste a sweeper, Mangli son of Sunder, sweeper and Bachhan son of Laiq, have been convicted of an offence under S. 68, Act 15 of 1872. In the case of Maha Ram S. 109, I. P. C., is to be read with S. 68, Act No. 15 of 1872.

The case for the prosecution is that Maha Ram is a Christian; that on 3rd June 1917, he was married to the daughter of one Shib Lal a Bhangi and that Bachhan and Mangli were "Mans" or so-called priests of the sweeper class who solemnised the marriage according to Bhangi rites. The assessors gave it as their opinion that Maha Ram was not a Christian and that therefore no offence under S. 68, Act 15 of 1872 had been committed. The learned Sessions Judge, however was of a different opinion. He found the accused persons guilty and sentenced them each to undergo rigorous imprisonment for a term of one year. The appellants have been represented in this Court by learned counsel. The contention on behalf of the appellants is that S. 68, Christian Marriage Act, does not apply; that Maha Ram was not a Christian at the time of his marriage; and that it is not proved that Bachhan and Mangli solemnised the marriage. The first point therefore that arises for consideration is whether Maha Ram was at the time of the marriage a Christian.

Act 15 of 1872 (and specially the section concerned a section imposing what may amount to a very severe punishment) has under the well-known rules for construction in such cases, to be so construed that no case be held to fall within it which does not fall both within the reasonable meaning of its terms and within the spirit and scope of the enactment. No violence must be done to its language in order to bring people within it, but rather

care must be taken that no one is brought within it who is not within its express language : *London County Council v. Aylesbury Dairy Company* (1). As Abbote, C. J., pointed out in *Proctor v. Manwaring* (2), it is not competent to a Court to extend the words by construction.

Now Act 15 of 1872 was an Act to consolidate and amend the law relating to the solemnisation in India of the marriages of Christians. This was the legislative intent and it will have to be seen that the interpretation placed upon the words in this section is one which harmonises with the context and promotes in the fullest manner the policy and object of the legislature. The term "Christian" is interpreted in S. 3 of the Act and runs as follows : "The expression 'Christians' means persons professing the Christian religion." The use of the word "means" in this passage shows that the definition is a hard and fast definition and that no other meaning can be assigned to the expression than is put down in the definition : *Gough v. Gough* (3) and *Bristol Trams & Carriage Co. v. Bristol Corporation* (4). In several sections of the Act, as for instance, Ss. 23 and 37, etc. another term is used namely, "Native Christian," also there is a part of the Act which is entitled "Marriage of Native Christians" and which extends from S. 60, to S. 65, Act 15 of 1872.

Section 3 interprets the expression "Native Christian." The meaning given to this latter expression is different from the meaning given by the Act to the expression "Christian." It includes the Christian descendants of natives of India converted to Christianity as well as such converts. If the legislature had contemplated applying S. 68, to a Christian i. e., a person professing the Christian religion and had wished to comprehend within it a Christian descendant of a native of India, it would have been easy to provide for this in S. 68. That no such provision was made confines S. 68 strictly to persons who at the time of marriage were persons professing the Christian religion. It is important to notice this as occasionally in the argument on behalf of the prosecution an attempt was made to contend that S. 68 applied not only

to a Christian but also to a Native Christian. I am unable to accept this contention and I hold that the issue which I have to decide is whether Maha Ram at the time when he was married to the daughter of Shib Lal was or was not a person professing the Christian religion. Again I repeat the word "means" which is to be found in S. 3 is an inclusive term and therefore no one except a person who professes the Christian religion comes within the purview of S. 68. This drives me back upon the necessity of deciding who is a person who professes the Christian religion. I have not been referred to, nor have I been able to find, any precedent which lays down clearly what meaning is to be attached to the words "profession of Christianity." Murray in the Oxford Dictionary, Vol. 7 (1903), interprets it thus:

"To affirm or declare one's faith in or an allegiance to; to acknowledge or formally recognise as an object of faith or belief (a religion, principle, rule of action, God, Christ, a saint, etc.)."

In the case before us we have not to deal with a person of an immature age or one who for any reason is unable to give a reasonable account of the faith that he holds, e. g., an orphan of tender years in a school, etc. For several years Maha Ram has been a grown up lad mixing in village in school life. There must have been many opportunities for observing and noting what he acknowledged or formally recognised as an object of faith or belief, and I should expect to have been referred to abundant evidence on this point. He is the son of one Kallu. Regarding Kallu the evidence is that he was elected to the position of elder in the Presbyterian Church; that he was ordained by the Presbytery; that he can under certain circumstances administer sacraments; that he is a moderator every year; that he has been confirmed; that he sits upon session as sir punch of a local church; that he was an officiating elder up to and after the marriage of Maha Ram; that he was an outspoken preacher; that he prayed and preached Christianity, that he taught Christianity in his own village and in adjoining villages; that on one occasion when a Thanedar said he would not believe Kallu to be a Christian unless he prayed, Kallu offered up prayers in public. All this is strong prima facie evidence of his having been a person who professed the Christian reli-

1. (1898) 1 Q B 106.

2. (1819) 3 B & Ald 145.

3. (1831) 2 Q B 665.

4. (1890) 59 L J Q B 441.

gion. The same might be said of evidence given regarding Bachhan and Mangli. It does go into as many details, but it gives specific instances where these men "professed" the Christian religion. I have searched in vain for similar definite and specific information in the case of Maha Ram. There is evidence which points the other way, for whatever it is worth. It seems to me of very little value and so I do not go into it.

The evidence upon this point given by the Crown consists of evidence given by: (1) The Rev. A. W. Moore, a Minister of the Presbyterian Church and a Missionary in charge of the Mission at Mainpuri; (2) Isa Das, the own brother of Maha Ram; (3) Sunder, who says that he became a Christian some five years ago; (4) Behari; (5) The Rev. W. T. Mitchell, Missionary at Mainpuri; (6) Madan Lal, a petition-writer. The evidence of the Rev. A. W. Moore is to the effect that Maha Ram is a Christian and that Bachhan and Mangli are also Christians. When cross-examined as to the meaning of this word Mr. Moore says "We call a man Christian though not confirmed or professing the Christian religion:" further on, while saying that Bachhan and Mangli had both to his knowledge professed Christianity, he does not make the same statement regarding Maha Ram. All that he says about Maha Ram is that his name was entered in the Baptismal Register, which sacrament was apparently administered at the time when Maha Ram was a babe three years old, that he never up to the time of his marriage told the witness that he was not a Christian, and that though he has seen him since his marriage he has not denied that he is a Christian. When the witness on one occasion said to him that judging by the clothes he wore, no one would take him for a Hindu, he laughed and said "no." The witness got Maha Ram entered in the Industrial School at Farrukhabad to learn carpentry. He was at the school up to within two or three days of the wedding. The school is for Christian boys only and witness sent him there as a Christian. This is all upon the point. It does not appear then from the evidence of this witness that Maha Ram ever took part in Church ceremonies such as prayers and the like. The next evidence in point of importance is that of Rev. W. T. Mitchell. He baptised Maha Ram when he

was three years old. In his examination in-chief this witness says that Maha Ram when he was in the school at Mainpuri professed to be a Christian; that he took part in church ritual a little before March 1915, but the witness does not specify what part or what particular ritual. In cross examination this witness says that while all the brothers and sisters of Maha Ram had been baptized they have, with the exception of one brother the witness Isa Das, been married according to Bhanghi rites. They have not strictly adhered to the tenets of Christianity. Isa Das the brother of Maha Ram gave it as his deposition that Maha Ram is a Christian. He never knew that Maha Ram had renounced Christianity. In cross-examination he had to admit that he lived apart from Maha Ram and that one of his sisters was married according to Bhanghi rites.

The rest of the evidence for the Crown is of little importance. It is however abundantly apparent from it that Maha Ram had given it out that he intended to have his marriage solemnised according to Bhanghi rites. Much attempt was made to dissuade him and his father from doing this, but the persuasions were in vain and it appears from the evidence of Mr. Moore that in a marriage solemnized according to Bhanghi rites idolatry takes place and devi ka puja or the worship of the goddess devi is gone through. In brief then it would appear from the above evidence that no distinct "profession" of the Christian religion is attributed to Maha Ram beyond the fact that he dressed as a Christian, that when he was at the school at Fatehgrah he wrote one or more letters in which he called himself Mahub Masih. He had never been admitted to sacrament and according to the witness Moore such admission depends upon a confession of faith. This Maha Ram has never been shown to have made. His brothers and sisters with the exception of Isa Das are all persons who have been married with Bhanghi rites and at such a marriage an open profession of idolatry is made before witnesses. I am not prepared to hold that a person is a person professing the Christian religion within the meaning of Act 15 of 1872 simply because he is baptised as an infant, when he has no possibility of saying to the world what is the faith to which he belongs, nor do

I attach any particular value to the fact that he attends a Christian school.

The learned counsel for the Crown wished me to hold that a person who took the advantages supplied by a Christian school was estopped by his conduct from professing that he was not a Christian. The dressing as a Christian seems also to me very far from being conclusive on this point especially in a class of persons who belong to the Bhangi class. The furthest point urged in this direction by the prosecution is perhaps the writing of letters under the title of Mahbub Masih; but no letter was produced nor was it shown that letters so written were at all of a public nature. On the other hand we have undoubtedly a profession in the case of his performing *devi ka puja* at the time of his marriage. That act was undoubtedly a profession, an act entirely inconsistent with, I might add repugnant to, the view that the person performing it was a person professing the Christian religion. I am not satisfied, therefore that at the time when this marriage was solemnised Maha Ram was a Christian. Holding as I do that Maha Ram was not a Christian at the time of this marriage, it follows that no offence under the Act, was committed on 3rd June 1917, either by the so-called principals Manglai and Bachhan or by the abettor Maha Ram. I do not consider it necessary to go into the question whether S. 68, Act 15 of 1872, was intended to penalise marriages other than those intended to be or purporting to be marriages under the Indian Christian Marriages Act 1872. It seems extremely doubtful whether it was so, but as I have said before the question does not arise for decision in this case.

Walsh, J.—I entirely agree. I should hold apart altogether from the general history of Maha Ram to which my brother has referred, that when a person on the eve of his marriage resists all pressure and persuasion to be married as a Christian by a Christian ceremony, and having by birth and connexion other religious associations, deliberately decides to marry a sweeper according to sweeper rites and does public worship to Hindu gods in the presence of his relations and friends, he is not "a person professing the Christian religion."

Mr. Sorabji contended that Maha Ram was "estopped" from denying his Christianity. Apart from the fact that the

principle of estoppel has no place in the criminal law, the idea of a "Christian by estoppel" is a contradiction in terms. The wider question, as to the real ambit of S. 68, Christian Marriage Act of 1872, is really involved in what we have decided and I propose to state my views about it for the following reasons. The case for the prosecution was argued mainly upon that ground; the learned Sessions Judge who decided this case obviously did not like it, but felt himself bound to follow the decision in *Ko'andai Velu v. Dequidt* (5); there has already been a division of judicial opinion on the subject; the question is one of public importance; I entertain no doubt upon it, and I think that prosecutions like the present should be discouraged. It is important to consider the scope and object of this legislation. It is a consolidating and amending Act, replacing the English Acts of 1818 and 1851 relating to marriages in India, and the Indian Acts of 1852, 1865 and 1866 dealing with the same subject. These were enabling Statutes providing special conditions appropriate to the special circumstances and difficulties which are likely from time to time to confront those in India who wish to be married by Christian marriage. The history of the legislation shows that doubts had arisen as to the validity of certain marriages, and it was clearly intended to facilitate such marriages and to validate them and at the same time to guard them by strict requirements. The legislation is not unlike the Foreign Marriages Act in England.

The object of the Act is not to prevent people marrying as they wish, but to enable them to protect themselves and their posterity by a lawful and binding marriage if they wish to be married as Christians. The Act is to be called the Indian Christian Marriage Act, and in my opinion, it deals with Christian marriages and Christian marriages alone. In future such marriages can only be lawfully effected under this Act. If they are not solemnized by one of the persons described in S. 5, they are made void by S. 4. The Act does not prohibit even a professing Christian from marrying otherwise than under the Act if he wishes to do so. We therefore start with this that there is no express prohibition preventing a professing Christian from doing violence to his

faith and marrying a non-Christian by a non-Christian ceremony. His marriage may not be valid by English law as a Christian marriage in India, but it is not forbidden to him. It would be a startling result of this Act, if such a person being free to choose and not prohibited from marrying otherwise than by a Christian marriage, should find himself liable to transportation for abetting the person who marries him.

An analysis of Part 7 of the Act, which deals with penalties, shows that such penalties are in the main directed against the offence of either one party or the other, or the officiating celebrant, or the official who may lawfully authorize the celebrant, wilfully and falsely doing some act in pretended pursuance of the Statute which probably would, and certainly might, render the whole proceeding invalid. Omitting S. 68 for the moment, every other offence dealt with is an act done which the Act requires to be done, and which is done either by a person lawfully authorized but by unlawful means, or by lawful means by an unauthorised person. Turning to S. 68 it is to be noted that the section does not make it criminal for a professing Christian to marry by a ceremony which is void under S. 4. It is confined solely to the persons who solemnize the marriage, and the Act makes it criminal for a person to solemnize a marriage who is not authorized by S. 5 to do so. But S. 5 only authorizes persons to solemnize Christian marriages, and nobody can solemnize Christian marriages in India who is not authorized by that section. S. 5 itself uses the word "Marriages" in the widest possible sense. "Marriages", it enacts, "may be solemnized in India," by certain specified persons. But this does not mean that no other marriages may be solemnized in India. That would be an impossible contention. It must therefore mean "Marriages under this Act," or in other words "Christian marriage." I read S. 68 therefore as referring to a class of persons, namely, those who solemnize or profess to solemnize a Christian marriage under this Act, not being authorized by S. 5 to do so. I cannot believe that the legislature could have intended to sweep into the net of the criminal law, through an indirect piece of legislation by reference, not only every professing Christian who chooses not to be married as a Christian,

but every non-Christian whom such persons might marry, and every non-Christian who took part in the solemnization or celebration. This would be contrary to the ordinary mode of interpretation of a Statute, and would produce far-reaching and almost ludicrous results.

I do not think the question turns upon the word "solemnize" so much as upon the object and scope of the Act. The case of *Queen-Empress v. Paul* (6) decided in 1896 turned on the word "solemnize." The Sessions Judge had acquitted on the ground that the part taken by the Hindu priest did not amount to solemnization. He seems to me to have been feeling for a way of evading the construction of the Act now contended for and to have seized on the word "solemnization." The appellate Court disagreed, but I think their minds were diverted from the real difficulty. They went on to hold that the contracting parties themselves ought to have been convicted of abetment. As I have said, this is a startling result, and satisfies me that there must be a fallacy in the reasoning which reaches it. I have carefully considered the recent case of *Kolandai Velu v. Dequidt* (5) decided by the Chief Justice and two Judges on a reference by Napier, J. I cannot agree with it. I see no answer to the reasoning in Napier J.'s referring order while the Chief Justice slips into an apparent error. "S. 68," he says:

"merely provides a penalty for solemnizing or professing to solemnize such a marriage contrary to the provisions of the Act."

This is not so. It provides a penalty for any person who does under S. 5 what he is not authorized to do, namely, solemnize a Christian marriage. Mr. Sorabji urged that the intention of the legislature was clear. They did not want the country flooded with void marriages with all the incidental evils as to illegitimate children and questions of property and inheritance. This result would be equally produced by a state of concubinage not regularized by any form of marriage, and the interpretation contended for might be said rather to encourage concubinage. On the other hand, as was pointed out by the Government-Advocate who appeared at our request so that the view of Government might be presented to us the Madras High Court in 1910 held that such a marriage as the present may be valid by Hindu law

if a custom is established governing such marriages: see *Muthusami Mudaliar v. Masilamani* (7). In that case the bride was a Roman Catholic. She removed the cross from her neck, and her forehead was smeared with holy ashes by a Brahman priest. The trial Court spoke of 'the prevalence of the practice of Hindus marrying Christian girls according to Hindu rites and such girls after their marriage following the Hindu religion.'

The validity of the marriage was upheld by the Madras High Court. This seems to me an additional ground for differing from the decision of the so-called Madras Full Bench in *Kolandai Velu v. Dequidt* (5). The result seems that at present according to the law in Madras, a valid Hindu marriage may be a criminal offence, both on the part of the principals and on the part of those who celebrate it. I cannot accept this consequence, which illustrates very forcibly the importance of holding to the principle which my brother Knox has reiterated of not straining a criminal enactment beyond what is included in its express terms.

By the Court.—We admit this appeal. We find Mangli and Bachhan not guilty of the offence charged, i. e., an offence under S. 68, Act No. 15 of 1872, and Maha Ram of abetment of the aforesaid act and direct that they be released. We understand they were permitted to give bail; if they did give bail, the bail-bonds will be discharged.

V.B./R.K.

Appeal allowed.

7. (1910) 33 Mad 312=5 I C 42.

A. I. R. 1918 Allahabad 174

TUDBALL, J.

Emperor

v.

Harak Chand Marwar — Opposite Party.

Criminal Ref. 753 of 1917, Decided on 8th November 1917, made by Sess. Judge, Gorakhpur, D/- 24th August 1917.

(a) Criminal P. C. (5 of 1898), Ss. 439 and 417—Revision against acquittal by private person—No appeal by Local Government—High Court is loth to interfere.

The High Court is loth to take up in revision cases of acquittal in which there has been public prosecution by a public official and which have not been brought before it on appeal by the Local Government. [P 174 C 2]

(b) Penal Code (45 of 1860), S. 266—Fraudulent intent is essential—Where both parties know falsity of measure no fraudulent intent exists.

A necessary ingredient of an offence under

S. 266, I. P. C., is fraudulent intent, and where both purchaser and seller are well aware of the actual measure being used, there can be no question of fraudulent intent. It is only when the seller purports to sell according to a certain standard and sells below that standard, that he can be said to be guilty of fraud. [P 175 C 1]

W. Wallach and Iswar Saran—for Opposite Party.

Judgment.—Criminal Reference Nos. 757, 758 and 759 are all similar and more or less connected with each other. One Harak Chand was prosecuted on two charges under S. 266, I. P. C., before a Magistrate in respect to two measures of length which he was using in the shop. The one measure was 35 inches, and the other measure was 35½ inches long. The Magistrate who tried the case came to the conclusion that in the village where these persons live and sell their wares the prevailing standard of measurement was 35½ inches long. In respect to the one measure, he therefore convicted Harak Chand and in respect to the other measure he acquitted him on the ground that fraudulent intent was not proved. He appealed against the conviction. The Sessions Judge altered the conviction from one section to another but maintained the sentence. In regard to the charge on which the accused has been acquitted, the learned Sessions Judge has sent the record to this Court with the recommendation that the order of acquittal should be set aside and the accused be convicted under S. 266 of the Code. I have read the order of reference. There are two points in the case. In the first place the Government has a right of appeal against the order of acquittal. This Court has always been loth to take up in revision cases of the description which have not been brought before it on appeal by the local Government. In the present case it is really a public prosecution by a public official which has taken place.

It is a matter in which Government is concerned and it is open to the District Magistrate to lay the matter before the Local Government with a view to an appeal being filed, if necessary the matter being one of more or less public importance. In the second place I have read the learned Sessions Judge's opinion as expressed in his order of reference and I have considerable doubt as to the correctness thereof. A necessary ingredient of an offence under S. 266 is fraudulent intent.

One knows full well that the measures of weight and measures of length which are in use in this country in villages and towns differ considerably from the standard measures laid down by Government under Act 2 of 1889. Where everybody both purchaser and seller are well aware of the actual measure being used, there can be no question of fraudulent intent. It is only when the seller purports to sell according to a certain standard and sells below that standard, that he can be said to be guilty of fraud. The case in my opinion is one which this Court ought not to take up in revision but one in which, if it is necessary the Local Government may appeal if it deems fit. Let the record be returned.

V.B./R.K.

Record returned.

A. I. R. 1918 Allahabad 175

WALSH, J.

Mahabir Rai and another—Defendants—Appellants.

v.

Sarju Prasad Rai and another—Plaintiffs—Respondents.

Second Appeal No. 301 of 1916, Decided on 30th May 1917, from decision of Addl. Dist. Judge, Gorakhpur, D/- 20th May 1915.

(a) Specific Relief Act (1 of 1877), S. 42—Denial of title must have been communicated to plaintiff to give cause of action—Limitation Act (1908), Art. 120.

The denial of title referred to in S. 42 must be communicated to the plaintiff in order to give him a cause of action. A claim or statement denying title not communicated to the owner cannot set the Statute of Limitation running against him. [P 176 C 1]

(b) Limitation Act (9 of 1908), Art. 120—Person in possession gets fresh cause of action on every repetition of denial of title—His forbearance on some occasion does not bar his right.

A person in possession is entitled to pass by an invasion of his right to the property and is not by his forbearance debarred from a future suit on a fresh assertion on the part of the defendant which amounts to a denial or repudiation of his title and gives him an independent cause of action. [P 167 C 1]

Uma Shankar Bajpai—for Appellants.

Jang Bahadur Lal—for Respondents.

Judgment.—In this case the judgment is perhaps open to criticism on the ground that it does not state the facts with sufficient precision and detail. The first Court clearly held that the plaintiffs were in proprietary possession of *sir* land and were entitled to the declaratory decree which they claimed. The defend-

dants appealed, first, on ground 1 in the memorandum that the suit was not triable by a civil Court, and, secondly, on grounds 2, 3 and 4 of the memorandum that the evidence and finding about possession in the first Court were erroneous, that the plaintiffs' witness were untrustworthy, and that the claim was time barred. The learned Judge says that there is no reason for interfering with the finding of the lower Court. I think that that is a complete adoption by the lower appellate Court of the findings of the lower Court.

There has however been an interesting argument before me that inasmuch as the plaintiffs are now held to have been in proprietary possession, their claim for a mere declaration of right is barred by the Statute of Limitation, and that the plaintiffs' action was superfluous. In the first place I am bound by the judgment of this Court in *Francis Legge v. Rambaran Singh* (1), that Art. 120 of the Schedule to the Limitation Act applies to a suit for a declaration with regard to immovable property. I think there are two answers to the appellants' contention. In this case the defendants' names were apparently entered in the *khewat* of 1885 and that entry no doubt gave the plaintiffs a right to sue for a declaration. There was however a further dealing with the matter by the revenue authorities in April 1914 on partition of the village and the respondents contend that that was what has been called a fresh invasion of the plaintiffs' right. I should prefer to call it a fresh assertion on the part of the defendants, which amounted to a denial or repudiation of the plaintiffs' title, which gave them an independent cause of action. In the case of *Francis Legge v. Rambaran Singh* (1) the plaintiffs had distinctly set forth their cause of action as having become complete when the entry was made in June 1883. In *Akbar Khan v. Turaban* (2) there was a finding of fact by the High Court that there had been no fresh invasion. *Chamier, J.*, in *Sheopher Singh v. Deo Narain Singh* (3) held that a fresh order with reference to an entry in the revenue papers made by a Commissioner gave rise to a fresh cause of action, and he said in the case of *Allah Jilai v. Umrao*

1. (1898) 20 All 95.

2. (1909) 31 All 9=1 I O 557.

3. (1912) 17 I O 675.

Hussain (4), where he and Rafique, J. took much the same view, that his previous decision in *Sheopher Singh v. Deo Narain Singh* (3) had been confirmed on appeal under Letters Patent, so that the judgment in Letters Patent appeal is binding on me. The same view was taken by Piggott, J. in *Rahmatullah v. Shamsuddin* (5), where he adopted the view of Blair, J., in *Itahi Bakhsh v. Harnam Singh* (6), where that learned Judge put the point very neatly that

"as a matter of law a person is entitled to pass by an invasion of right to property and is not by his forbearance debarred from a future suit for a future invasion."

In the second place, apart from any other consideration I think the cause of action referred to in *Francis Legge v. Rambaran Singh* (1); and *Akbar Khan v. Turaban* (2) must be a cause of action for a declaration contemplated by S. 42, Specific Relief Act. It has been called a cloud upon the title or an invasion of the plaintiffs' right. I prefer to adopt the language of the statute:

"Any person entitled to any right as to any property may institute a suit against any person denying his title to such right."

The Court has a discretion to make the declaration, but the denial referred to in S. 42 Specific Relief Act, must obviously be communicated to the plaintiffs, in order to give him a cause of action. It is difficult to see how a claim or a statement denying title not communicated to the owner can set the statute running against him. The plaintiffs in this case alleged and relied upon the cause of action arising in April 1914. It has been found as a fact. I think they were entitled to sue for a declaration and that the appeal must be dismissed with costs including fees in this Court on the higher scale.

V.B./R.K.

Appeal dismissed.

4. A I R 1914 All 184=36 All 492=24 I C 535.
5. (1913) 21 I C 609.
6. (1898) A W N 215.

A. I. R. 1918 Allahabad 176

RICHARDS, C. J. AND BANERJI, J.

Ramji Das and others—Petitioners—Appellants.

v.

Bhagwan Das and others—Opposite Parties—Respondents.

First Appeal No. 50 of 1917, Decided on 6th November 1917, from order of Addl. Sub. Judge, Moradabad, D/- 10th February 1917.

(a) Civil P. C. (5 of 1908), O. 9, Rr. 3 and 4—Dismissal for default for second time is no ground to refuse restoration.

The mere fact that a case had previously been dismissed for default is no reason for refusing to restore it after a second dismissal. [P 176 C 2]

(b) Civil P. C. (5 of 1908), O. 9, R. 4—No appeal lies against order under R. 4—It cannot be indirectly allowed by treating appeal as revision.

No appeal lies from an order made under O. 9, R. 4. A Court is not entitled indirectly to allow an appeal which is not given by the Code by treating the matter as one in revision.

[P 177 C 1]

Radha Kant Malaviya—for Appellants.

Gokul Prasad—for Respondents.

Judgment.—This appeal is from an order of the Court below refusing to set aside a dismissal made under O. 9, R. 3. The suit was a suit for partition. It commenced on 3rd May 1915 and the history of the case shows that there have been various proceedings from time to time. At one time there was an application by both parties to refer the matter to arbitration but the order of reference to arbitration was subsequently cancelled and 18th November was finally fixed for disposal of the case. Upon that day the suit was dismissed on the ground that neither party appeared. The very same day Ramji Das the plaintiff made an application to the Court alleging that the name "Ram Charan Das" had been wrongly called out as the name of the plaintiff and that the plaintiff Ramji Das mistaking the name did not know that his case had been called but that he was present. He said in his affidavit to support his application that when he heard Bhagwan Das the defendant's name called he came in but the suit had already been dismissed. He does not say that he had any pleader. The learned Subordinate Judge in refusing the application of Ramji Das to set aside the order dismissing the suit, says that the case had previously been dismissed for default, and that he saw no reason for restoring the case on this occasion. We think that this was hardly a good ground. If Ramji Das was in Court as he alleges he was, the Court, we think should have been satisfied upon his affidavit not contradicted by the other side made on the very day the suit was dismissed and should have held that the plaintiff had satisfied the Court that there was sufficient cause for his non-appearance at the moment his name was called.

If an appeal lay against the order of the learned Judge we think that we would entertain it. A preliminary objection however has been taken by the other side that no appeal lies and it is quite clear from the provisions of the Code of Civil Procedure that no appeal lies against an order made under O. 9, R. 4. An appeal is given under similar circumstances where the order is made under O. 9, R. 9. The reason for this appears to be that where the suit is dismissed under O. 9, R. 3, the plaintiff is entitled to bring a fresh suit. Where the order is made under O. 9, R. 8, the plaintiff is not entitled to bring a fresh suit. We are asked to treat the matter as one in revision. We think that we are not justified in doing this. The Court is not entitled indirectly to allow an appeal which is not given by the Code. It appears in the present case that by some error the suit was dismissed with costs but looking at the decree we find that no sum is awarded for costs. Mr. Gokul Prasad on behalf of his client admits in open Court that his clients under this decree are entitled to no costs. We dismiss the appeal and make no order as to costs.

V.B./R.K.

*Appeal dismissed.***A. I. R. 1918 Allahabad 177 (1)**

RICHARDS, C. J. AND BANERJI, J.

Mohamad Zaki—Plaintiff—Appellant.

v.

Municipal Board of Mainpuri—Defendants—Respondents.

Civil Revn. No. 230 of 1917, Decided on 25th April 1918, against the decree of Sub-Judge, Mainpuri.

Civil P. C. (1908), O. 33, R. 8—Person obtaining leave to sue in forma pauperis adjudicated insolvent—Receiver can continue suit—Provincial Insolvency Act (1907), S. 20.

Where a plaintiff obtains leave to sue in forma pauperis and after the commencement of the suit is adjudicated an insolvent, the Receiver in insolvency is entitled to continue the suit just as the insolvent could have done. [P 177 C 2]

*Baleshwari Pershad—for Appellant.**A. E. Ryves—for Respondents.*

Judgment.—We think that the order of the Court below was clearly wrong. One Nisar Ali brought a suit and made an application to sue in forma pauperis. Eventually he was permitted to bring the suit in this way. Meanwhile he was adjudicated an insolvent. The receiver in the insolvency wished to continue the proceedings. The learned Subordinate

1918 A/23 & 24

Judge points out that he had never given leave to the receiver to sue in forma pauperis and that the Receiver not being personally liable either to the Government or to the defendants, he ought to pay court-fees. He accordingly made an order that the Receiver should pay the court-fees on the plaint and on all the applications. We think that once Nisar Ali obtained leave to sue in forma pauperis in a suit which had been commenced before his insolvency, the receiver was entitled to continue the suit just as Nisar Ali could have done, and in this respect the order of the Court below was wrong. The Court is, of course entitled, to order the receiver to give security for the costs as required by O. 22, R. 8. This matter is not now expressly before us. We have only to consider the legality of the order passed by the Subordinate Judge. We allow the application, set aside the order of the Court below and remand the case to that Court, with directions to re-admit the case and deal with it according to law as pointed out by us. Costs here and heretofore will be costs in the cause.

V.B./R.K.

*Case remanded.***A. I. R. 1918 Allahabad 177 (2)**

PIGGOTT AND WALSH, JJ.

Jagardeo Singh—Defendant—Appellant.

v.

Ali Hammad and others—Plaintiffs—Respondents.

Second Appeal No. 118 of 1915, Decided on 10th January 1918, from decree of Dist. Judge, Azamgarh.

(a) *Agra Tenancy Act (1901) Ss. 34 and 199—Usufructuary mortgage of sir lands before Act—Suit by mortgagee in Revenue Court to eject defendant alleged to be non-occupancy tenant—Relationship of landlord and tenant denied by defendant who had acquired part of equity of redemption of mortgaged land—Question of title referred to civil Court which held that plaintiff was entitled to exclusive possession—Revenue Court consequently ejecting defendant holding him to be non-occupancy tenant—No appeal lies to District Judge—Defendant held rightly ejected.*

Plaintiffs, as usufructuary mortgagees of certain sir lands, brought a suit in the Revenue Court for ejectment of the defendant, on the allegation that they were in possession of the land under a mortgage existing before the passing of Act 2 of 1901 and that the defendant was a non-occupancy tenant of the same. The defendant, who had acquired a part of the equity of redemption of the mortgaged land

denied the relationship of landlord and tenant between himself and the plaintiff. The Revenue Court referred the parties for the determination of the question of title to the civil Court, which held that the plaintiffs were entitled to remain in exclusive possession as mortgagees and that defendant had acquired a share in the equity of redemption. In accordance with this the Revenue Court, holding that defendant was a non-occupancy tenant, ordered his ejection. On the Commissioner's refusal to entertain the defendant's appeal, the latter appealed to the District Judge who rejected it holding that the question of title had been finally and completely disposed of by the civil Court in the civil suit:

Held: (1) that the District Judge was right in holding that no appeal lay to his Court;

(2) that the defendant had been rightly ejected by the Revenue Court. [P 179 C 1]

(b) *Agra Tenancy Act (1901), S. 34*—"Person occupying land without consent of landlord"—Meaning explained.

Per Walsh J.—The words "a person occupying land without the consent of the landlord" in S. 34, Agra Tenancy Act, mean one who enters into occupation without the express consent of the landlord or without any previous arrangement with him. [P 179 C 2]

Iqbal Ahmad—for Appellant.

S. M. Yusuf Hasan—for Respondents.

Piggott, J.—These are four connected appeals which have come before us under the following circumstances. The plaintiffs instituted, in the Court of the Assistant Collector, Azamgarh, four suits for the ejection of the defendant from certain specified plots of land, in each case with the allegation that they themselves were mortgagees in possession of the proprietary rights over the said plots, and the defendant was a non-occupancy tenant of the same. The defendant replied that there was no contract of tenancy between himself and the plaintiffs; that his possession was proprietary in its nature and that he was in possession as of right; because he was a cosharer in the proprietary rights of the particular subdivision of a mahal to which the land in suit appertained. On this the learned Assistant Collector took action under S. 199, Act 2 of 1901, requiring the defendant to file a suit in the civil Court for the determination of the question of title in issue between himself and the plaintiffs. The Court of first instance determined the question in favour of the present defendant who was, of course, the plaintiff in the civil Court.

On appeal, however, this decision was reversed. The controversy in this case has been very largely as to the meaning and effect of the appellate Court's deci-

sion in this litigation. The decision fairly considered amounts to this, that the plaintiffs-respondents (the defendants in the civil Court) held a usufructuary mortgage in respect of the plots of land in suit and were entitled to the exclusive possession of the same as such mortgagees; but the present defendant had acquired a share in the proprietary rights, that is to say, in the equity of redemption, in respect of the mortgage held by the opposite party. The case came again before the Assistant Collector, who was bound to dispose of the ejection suit then pending before him in accordance with the final decision of the civil Court. He passed a brief order to the effect that in view of the decision of the civil Court, the defendant could only be regarded as in possession of the land in suit as a sub-tenant, that is to say, a non-occupancy tenant (the land in question being *sir* land) from the plaintiffs. He ordered the defendant to be ejected accordingly. The defendant filed an appeal in the Commissioner's Court, who refused to entertain it, holding that a question of proprietary title was still in issue as between the parties. The defendant then went before the District Judge in appeal, who dismissed the appeal holding that the question of proprietary title, originally in issue, had been finally and completely disposed of in the suit already referred to, and that there was no question left for determination in the case which was not exclusively cognizable by the Revenue Courts. Against this decision four second appeals have been filed. When the case originally came up for hearing, the facts were not as clear as they are now, and an order was passed directing the District Judge to entertain the defendant's appeal and to determine certain issues of fact.

We have now before us the findings arrived at by the District Judge on the issues remanded, and as a matter of fact his findings proceed on admissions made by the parties. The mortgage under which the present plaintiffs-respondents now hold, and have been holding since 1902, was a mortgage of the specific plots of *sir* land which are now in suit. The mortgage itself had been contracted prior to the passing of the present Tenancy Act; so no question of expropriary rights arises. On the terms of the mortgage the plaintiffs, as transferees of the

mortgagee rights, were entitled from 1902 and onwards to actual possession and enjoyment in respect of the land in suit.

The defendant, having acquired a part of the equity of redemption, asserted a right to take possession of some of the *sir* lands, without tendering the mortgage money. In prosecution of this claim he somehow succeeded in obtaining possession of the plots of land now in suit. The question specifically raised by these appeals is whether the learned District Judge was right or wrong in holding that no appeal lay to his Court. I should be prepared to hold that that decision was correct, but the matter has now gone somewhat further. After the order of remand and the ascertainment of the facts, the real question before us is whether the Assistant Collector was right in ordering ejectment of the appellant. On the principles laid down by a learned Judge of this Court in *Balli v. Naubat Singh* (1) the Assistant Collector was clearly right. It has been suggested, on the other side, that this decision was doubted in a Full Bench decision of this Court in the later case of *Nandan Singh v. Ganga Parhsad* (2): (see specially the remarks at p. 516 of 35 *All.*) As a matter of fact the decision reported as *Balli v. Naubat Singh* (1) was not specifically considered or in terms overruled, though it is open for the appellant to contend that remarks of the learned Chief Justice when delivering the judgment of the Full Bench, suggest that he was not prepared to accept the correctness of that ruling. We find however that the principle laid down in *Balli v. Naubat Singh* (1) has been in substance accepted and followed by the Revenue Court since that decision was pronounced. Reference may be made to the notes by Mr. M. L. Agarwala in his valuable commentary on the N. W. P. Tenancy Act, 5th Edn., at p. 40 *et seq.* of that edition. Moreover there is a decision of the Board of Revenue, *Champa Kuar v. Pati Ram* (3), which deals with the position of a squatter occupying agricultural land for cultivating purposes, and which adopts the principle of the case of *Balli v. Naubat Singh* (1) to its fullest extent. In this state of authorities I should be prepared personally to stand by the reported deci-

sions directly bearing on the question before us. Moreover I think that, there being nothing in favour of the defendant on the merits, it is not incumbent on us to go out of our way to insist upon any legal technicalities for the sake of enabling the defendant to prolong this litigation. The decision in the case of *Champa Kuar v. Pati Ram* (3) is by the Senior Member of the present Board of Revenue; and it is quite clear that if the defendant had got what he asked for, namely, a reconsideration of the Assistant Collector's order by the higher Revenue Courts, the result would have been to affirm his ejectment.

So far as the civil Courts are concerned they have already decided in favour of the plaintiffs-respondents, and, if the present matter could rightly be taken cognizance of by the civil Courts, they could not have come to a different decision from that arrived at by the Assistant Collector. The defendant's possession is wholly unlawful and the order of ejectment a proper order on the merits. There are thus abundant reasons for dismissing these appeals.

Walsh, J.—I agree; particularly I accept the cases of *Balli v. Naubat Singh* (1) and *Champa Kuar v. Pati Ram* (3) as the correct expression of the law. I am not satisfied that in *Nandan Singh v. Gaya Parshad* (2) the Full Bench intended to dissent from the case of *Balli v. Naubat Singh* (1), which was relied on by the appellant who succeeded; but I think the dictum at the foot of p. 515 in 35 *All.* requires further consideration. Apparently the Chief Justice thought that S. 34, Act 2 of 1901 could only be made to work so long as the person was occupying the land "without permission" of the landlord. The words in the section are not "without permission." I am satisfied that the words "a person occupying land without the consent of the landlord" mean one who enters into occupation without express consent or without any previous arrangement with him. Two reasons seemed to me very strong to show this. If S. 34 can be worked only against a person who having entered as a trespasser continues in possession "without permission" of the landlord, it is difficult to see how the landlord is to get rent from a person who does remain in possession with his permission, secondly, such a person is said by the section not to be

1. (1912) 16 I O 120.

2. (1918) 85 All 512=20 I O 892.

3. (1916) 88 I O 70.

deemed to hold the land within the meaning of S. 11, Agra Tenancy Act, until he begins to pay rent. S. 11 deals only with tenants and I cannot see how such a person could be deemed to be a tenant within S. 11 so as to make it necessary for the Legislature to exclude him from the operation of S. 11, unless he was occupying with the permission of the landlord. I think this consideration lends additional weight to the view of Sir George Knox and of the Senior Member of the Board and I agree with my learned brother that the defendant is liable to be ejected by the Revenue Courts.

By the Court.—We dismiss this appeal with costs.

V.B./R.K.

Appeal dismissed.

A. I R. 1918 Allahabad 180

TUDBALL AND ABDUL RAOOF, JJ.

Hamida Bibi—Defendant—Appellant.

v.

Fatima Bibi—Plaintiff—Respondent.

First Appeal No. 70 of 1917, Decided on 18th March 1918, from order of Sub-Judge, Allahabad.

Limitation Act (1908). S. 14—Suit brought in Small Cause Court—Court directing plaintiff to be returned for presentation to proper Court—Plaintiff refusing to take back plaint and lodging revision—Revision dismissed—Three months after dismissal of revision plaintiff asking for return of plaint—Period of three months cannot be excluded as there was no due diligence on plaintiff's part—Plaintiff was not justified in refusing to take back plaint merely because he wished to file revision.

A decree for rent was obtained against two co-tenants of a holding and was satisfied by one of them on 9th August 1910. On 20th May 1913 the latter instituted a suit for contribution against the other co-tenant in the Small Cause Court which holding that it had no jurisdiction to try the suit, directed the return of the plaint for presentation to the proper Court on 27th November 1913. The plaintiff refused to take back the plaint and lodged a revision in the High Court on 19th February 1914, which was dismissed on 16th March 1915. On 15th June 1915 she applied for the return of the plaint which was returned on 30th June 1915, on which day she presented it in the Court of the Munsif.

Held: that even if it were assumed that the plaintiff was entitled to exclude the period from 20th May 1913 to 16th March 1915, she could not in any case be allowed to exclude the period between 16th March and 30th June under S. 14, inasmuch as she did not prosecute her suit with due diligence in view of the fact that she waited for three months after the dismissal of her application for revision before she asked for the return of the plaint and that therefore the suit was barred by time;

Held further: that the plaintiff was not justified in refusing to take back the plaint from the Court of Small Causes merely because she wished

to file a revision in the High Court, inasmuch as if she had taken back the plaint her action could not have prejudiced her application for revision and, on the other hand she would have been able to present the plaint in the proper Court immediately on the dismissal of the application.

[P 181 C 1]

Mukhtar Ahmad for *Haidar Mehdi*—for Appellant.

S. M. Sulaiman and *Lalit Mohan Banerji*—for Respondent.

Judgment.—This is an appeal against an order of remand passed by the Court below. The question was one of limitation and application of S. 14, Lim. Act. The parties to this suit were co-tenants in a holding. A suit was brought against them for rent and a decree was obtained (against them jointly) on 6th July 1910. On 19th August 1910 the plaintiff paid the decretal debt. On 20th May 1913, some 90 days before the expiry of the period of limitation which is fixed by Art. 99, Sch. 1, she instituted a suit in the Small Cause Court. An objection was taken that the Court had no jurisdiction and on 27th November 1913, the Small Cause Court held that it had no jurisdiction and directed the plaintiff to take back the plaint and file it in the proper Court. The plaintiff refused to take back the plaint. On 19th February 1914, that is, nearly 90 days after the order of the Small Cause Court, she filed an application in the High Court for revision of the order. This application was dismissed by this Court on 16th March 1915. The plaintiff then apparently took a rest. She waited until 15th June 1915, that is, for full three months, and then applied to the Court for the return of the plaint. There was some delay and she received it on 30th June. On that same date she presented the plaint in the Court of the Munsif. The Court of first instance held that the suit was barred by limitation. The lower appellate Court has allowed to the plaintiff the period from 20th May 1913 to 30th June 1915 under S. 14, Lim. Act and has held that the suit is within time. Assuming without deciding that the period from 27th November 1913 to 16th March 1915 may be allowed to the plaintiff under S. 14 of the Act, we fail to see that she has been prosecuting her case with due diligence in view of the fact that she waited for three months after the dismissal of her application for revision before she asked for the return of the plaint. We also cannot agree that

the plaintiff was justified in refusing to take back her plaint from the Court of Small Causes because she wished to file an application in revision to this Court. If she had taken back her plaint as she could easily have done without any prejudice to the prosecution of her revision, it would have been in her hands directly the revision was dismissed and she could have at once filed in the Court of the Munsif. On the contrary she preferred to wait for three months before she asked for the return of it. We do not think that she is entitled to any allowance for any period after 16th March 1915. If the period up to that time be allowed to her, her suit should have been filed on or before 16th June 1915. It was not so filed and we therefore agree with the Court of first instance that the suit is barred by limitation. We allow the appeal, set aside the order of the lower appellate Court and restore the decree of the Court of first instance with costs in all Courts.

V.B./R.K. *Appeal allowed.*

A. I. R. 1918 Allahabad 181 (1)

BANERJI, J.

Sukru—Accused—Applicant.

v.

Emperor—Opposite Party.

Criminal Ref. No. 210 of 1918, Decided on 15th April 1918, made by Sessions Judge, Allahabad.

U. P. Excise Act (4 of 1910), Ss. 66 (a) and 71—Accused in possession of liquor—Presumption is not of manufacture.

Accused admitted that his son was ill and that he had brought a small quantity of liquor from his brother-in-law :

Held : that the only presumption to which the admission gave rise was that the accused was in possession of an excisable article, and not that he had himself manufactured the liquor.

[P 181 O 1]

Judgment.—The accused in this case was convicted on his own plea of being in possession of illicit liquor and was sentenced under S 60 (a), Excise Act, to one and a half months' rigorous imprisonment. The statement of the accused which the Magistrate apparently accepted was that his son was ill and that he had brought a small quantity of liquor from his brother-in-law. The Magistrate was of opinion, as he states in his explanation that under S. 71 of the Act the presumption was that the accused had himself manufactured the liquor. No such presumption arises in the case. The only presumption is that the accused was in

possession of an excisable article. This however the accused himself admitted. Under the circumstances the sentence of imprisonment was unduly severe and was not called for. I accordingly reduce the sentence to one of a fine of Rs. 10 or, in default, to one week's rigorous imprisonment. If the fine is paid the bail bond given by the accused will be discharged.

V.B./R.K.

Sentence reduced.

A. I. R. 1918 Allahabad 181 (2) Special Bench

KNOX, AG. C. J., RAFIQUE AND
PIGGOTT, JJ.

Khub Chand and others, In the matter of.

Stamp Ref. in Civil Misc. No. 180 of 1917, Decided on 6th August 1917.

Stamp Act (2 of 1899), Ss. 38, 40 and 57—Document, insufficiently stamped—Deficit duty levied by Collector—Reference to High Court is not competent.

Where a Collector holding that a document is not sufficiently stamped levies the deficit duty and penalty and then certifies that the document is sufficiently stamped, the case before the Collector is fully decided and a reference to the High Court under S. 57 is not competent. In such a case there is no room for any further disposal by the High Court in accordance with S. 59 of the Act. [P 182 C 1]

Narayan Prasad Asthana—for *Khub Chand*.

W. Wallach—for the Crown.

Knox, Ag. C. J.—This is a reference made to this Court by the Chief Controlling Revenue Authority. It is said to be made under the provisions of S. 57, sub-S. (1), Stamp Act, 1899. It is not a case that was referred to the Chief Controlling Revenue Authority under S. 56, sub-S. (2). Therefore if it falls at all under S. 57, sub-S. (1), it must be deemed to be a case otherwise coming to the notice of the Chief Controlling Revenue Authority. In its order of reference the Chief Controlling Revenue Authority states it as a case coming to the notice of the Board while scrutinising the monthly statement of cases of the infringement of the Stamp law of Agra submitted by the Controller under R. 204 of the Stamp Manual. The point arises whether the record before us is the record of a case within the meaning of S. 57, sub-S. (1). The questions involved, so far as stamp duty is concerned, have been before the Collector of Agra under S. 38 (2), Stamp Act. The Collector has held that the sale-deed in question was not sufficiently stamped, that the deficit stamp duty pay-

ble amounted to Rs. 4. This deficit duty he had levied together with a penalty of Rs. 5, under S. 40, sub-S. (1), Cl. (b) of the Act. We understand that the deficit duty and the penalty have both been paid. This is in accordance with the statement made by the Chief Controlling Revenue Authority. Presumably therefore the Collector has certified by endorsement upon the deed that it is now duly stamped.

Under S. 40, sub-S. (2), this certificate is for the purposes of the Stamp Act conclusive evidence of the matter stated therein. The case before the Collector has been fully decided and there appears to be no room for any further disposal in accordance with S. 59, sub S. (2, Stamp Act. The very same point that is before us came before the Madras High Court; see *Reference under Stamp Act*, S. 57 (1). The learned Judges before whom the reference came were divided in their opinion. Two of the learned Judges arrived at the opinion that S. 57, Stamp, Act did not give the High Court jurisdiction as there was nothing regarding which the High Court could be asked to pronounce judgment. The learned Chief Justice took a contrary view. After the hearing of arguments addressed both by the learned vakil for Khub Chand and the Government Advocate, I am of opinion that the view taken by the Madras High Court was the correct view and that this is not a case within the meaning of S. 57. No definition of the word "case" has been cited in the argument on either side, and I know of no definition by the Indian Courts upon the meaning of this word. I find on referring to Wharton's Law Lexicon, Edn. 11, p. 147, that the word "case" is defined as (1) a trial, (2) a trial involving some point of law so important as to be published in the law reports as a precedent. This confirms me in the view I have taken and I would return this reference to the Chief Controlling Revenue Authority with the opinion that the matters referred are, under the circumstances, not within the jurisdiction of this High Court.

Rafique, J.—I agree.

Piggott, J.—I agree.

V.B./R.K.

*Reference answered
accordingly.*

A. I. R. 1918 Allahabad 182

KNOX, J.

Nanhe—Accused.

v.

Emperor—Opposite Party.

Criminal Ref. No. 239 of 1918, Decided on 3rd May 1918, made by Sess. Judge, Budaun.

Criminal P. C. (1898), Ss. 118 and 514—Surety offering house property as security can be accepted.

Accused was ordered under S. 118, Criminal P. C. to furnish a bond for Rs. 200 and to provide one respectable and reliable surety in Rs. 100. A surety came forward and offered as security house property which the Tahsildar reported to be worth Rs. 500. The surety was also reported to be respectable.

Held: that the surety and the security offered might be accepted, notwithstanding that so long as the surety was alive only moveable property could, for default under S. 514, be attached and sold for recovery of the penalty. [P 182 C 2]

Judgment.—The Sessions Judge of Budaun has referred the following matter. One Nanhe was ordered under S. 118, Criminal P. C. to furnish a bond for Rs. 200 and to provide one respectable and reliable surety in Rs. 100. A surety came forward and offered security. The security was house property, about which the Tahsildar reported that the house owned by the surety was worth Rs. 500 and that he was a respectable person. Still the Magistrate refused to accept it on the ground that under S. 514, Criminal P. C., only moveable property can be attached and sold for the recovery of any penalty ordered under that section. No proceedings could be taken against a house and the District Magistrate considered the security insufficient. While it is true that so long as a surety is alive only moveable property can, for default under S. 514, Criminal P. C., be attached and sold for recovery of penalty, yet I agree with the learned Sessions Judge that if the house offered as security is worth Rs. 500 and the surety is reported by the Tahsildar to be a respectable person, the security should be accepted. I set aside the order of the learned District Magistrate and direct that the surety and security offered be accepted. Let the record be returned.

V.B./R.K.

Order set aside.

A. I. R. 1918 Allahabad 183 (1)

TUDBALL AND ABDUL RAOOF, JJ.
Gauri Sahai—Plaintiff—Appellant.

v.

A. C. Bahree—Defendant—Respondent.

First Appeal No. 148 of 1917. Decided on 19th March 1918, from order of Sub-Judge. Bulaun.

Allahabad High Court Rules, Ch. 21, Rr. 21 and 25 — Defendant objecting to Court's jurisdiction — Point of jurisdiction decided and plaint returned for presentation to proper Court with costs to defendant—Pleader's fees can properly be calculated under R. 21.

Plaintiff filed a suit in the Subordinate Judge's Court. The defendant pleaded that the Court had no jurisdiction to try the suit. This issue was taken up first at the request of the plaintiff and decided in favour of the defendant. The Court ordered the plaint to be returned and awarded the defendant his costs. In drawing up the decree the pleader's fee was calculated at 5 per cent. according to R. 21, Ch. 21 of the General Rules (Civil) for the Subordinate Courts:

Held: that the suit having been decided on contest and on the merits of the contest so far as that contest went, R. 21 applied to the case and the fee was properly calculated. [P 183 C 1]

Lakshmi Narain—for Appellant.

Nehal Chand—for Respondent.

Judgment.—The facts of this case are simple. The plaintiff-appellant filed a suit against the defendant. Notice was issued, a written statement filed and issues were framed. One of the issues raised the question of the jurisdiction of the Court. It was pleaded by the defendant that the learned Subordinate Judge had no jurisdiction to try the suit. This issue was taken up first at the request of the plaintiff and decided in favour of the defendant. The Court ordered the plaint to be returned and awarded the defendant his costs. In drawing up the decree the pleader's fee was calculated at 5 per cent. according to R. 21, Ch. 21 of the General Rules (Civil) for the Subordinate Courts. The plaintiff objected on the ground that this rule did not apply but that R. 25 of that Chapter did apply. The lower Court has held that the case falls within R. 21. On behalf of the appellant it is urged that the case was not decided on the merits; but it was clearly decided after contest and on the merits of the contest so far as that contest went. We do not think that R. 25, which applies to appeals from orders and other cases, is intended to cover a case of the present kind. In our opinion R. 21 clearly applies in this case. There is therefore no force in the appeal. We accordingly dismiss it with costs.

V.B./R.K.

Appeal dismissed.

**** A. I. R. 1918 Allahabad 183 (2)**

Full Bench

RICHARDS, C. J. KNOX AND BANERJEE, JJ.

Kalika Baksh Singh and others—Judgment-debtors—Appellants.

v.

Ram Charan and others—Decree-holders—Respondents.

Execution First Appeal No. 285 of 1917. Decided on 10th May 1918, from a decree of Sub-Judge, Allahabad.

** Limitation Act (1908), Art. 182(6)—“Date of issue of notice” is date of order directing issue of notice.

The words “date of issue of notice” in Cl. (6), Art. 182 mean the date of the order of the Court directing that notice should go and not the date on which the notice is signed or actually leaves the Court. [P 184 C 2]

Panna Lal and Balmakund—for Appellants.

Peary Lal Banerjee and Saila Nath Mukerjee—for Respondents.

Judgment.—This appeal arises out of an application for execution of a decree. Originally there was a decree in a mortgage suit. The mortgaged property having all been sold and found insufficient to satisfy the debt, a decree under O. 34, R. 6, was granted on 4th March 1911. An application was made for execution of this decree and on 3rd March 1910, the Court ordered that notice should go to the judgment-debtors. The application in execution was subsequently struck off. It appears that notice did go from the Court but nevertheless the application was struck off. On 5th March 1917, the present application for execution was made. It was met with the objection on behalf of the judgment-debtors that it was barred by time. The notice which went from the Court in consequence of the Court's order dated 3rd March 1914, was dated 4th March. The 4th March 1917 was a Sunday. Accordingly if the period of limitation is to be reckoned from 4th March 1914, it is just within time; if on the other hand it is to be reckoned from 3rd March 1914, it is just too late. The Article which is applicable is Art. 182, Cl. (6). That clause is as follows:

“(Where the notice next hereinafter mentioned has been issued) the date of issue of notice to the person against whom execution is applied for to show cause why the decree should not be executed against him, when the issue of such a notice is required by the Code of Civil Procedure, 1908.”

Notice was required by the Code of Civil Procedure in the present case, be-

cause the decree was more than a year old. The question in the case is as to the meaning of the expression "date of issue of notice." Under the previous Limitation Act the words were identical, except that instead of the expression "date of issue of notice" the expression is "date of issuing a notice." Under the previous Act the practice had been uniform in this Court since the year 1881 that the "date of issuing a notice" meant the date of the order of the Court directing that notice should go. The Bombay High Court seems to have followed a similar practice, whilst the High Courts of Madras and Calcutta have taken a different view. The expression "issuing of a notice" or "issue of notice" is somewhat ambiguous. What happens in the Court is that an application is made for execution. The Court orders that notice should go to the party against whom execution is sought. That notice is prepared in the office and is signed either by the Judges or some person whom he deposes to sign for him. In the present case the notice is signed by the munsarim. After the notice is prepared and signed and sealed, it is given to the Nazir who in turn selects a peon, who is to serve it on the party to whom it is directed. It is extremely difficult to say when a notice of this kind can be said to have been "issued." The "issue" is certainly not complete when the Court makes its order directing that notice is to go. It is still incomplete when it is prepared and signed by the munsarim. In fact the "issuing" is not fully complete until it has actually left the hands of the Nazir and has been given into the hands of the peon (or process-server). If this question which we have had discussed before us in the present case was *res integra*, we would find it extremely difficult to say what was the date of the "issue" of the notice within the meaning of the Article.

The "issue" of a notice seems to be a proceeding which begins with the order of the Court and ends with delivery of a notice to a process-server for service. Possibly a convenient date might be the one which has been suggested in the course of the argument, namely, the date which the notice itself bears. We however think that we ought to adhere to the practice which has been in force for a very great number of years in these provinces, unless we come to the conclusion that there was a deliberate alteration in

the present Limitation Act. What is required in the interest of justice is a settled rule and a date that is certain. The date of handing over to the peon for service would be a very inconvenient date. We find it impossible to see that there is any difference between the expression "date of issuing of a notice" and the expression "date of issue of notice." That being so, we think the established practice should prevail and that the order below was wrong. A second point was mentioned in the course of the argument, namely, that some of the decree-holders are minors and that they are entitled to the benefit of S. 7, Lim. Act. It appears in the present case that at the time the decree was made the decree-holders were all of full age, that also at the time of the application of 1914 the decree-holders were of full age, and that it was after the date on which the application was struck off that the minority ensued. Under these circumstances the decree-holders are not entitled to the benefit of S. 7: see *Bhagat Bihari Lal v Ram Nath* (1). We were referred to the Full Bench decision in *Zamir Hasan v. Sunder* (2). In that case there had been an application on behalf of minor decree-holders which gave a fresh starting point and accordingly the decree-holders were within the express provisions of S. 7. We allow the appeal, set aside the order of the Court below and dismiss the application for execution with costs in both Courts.

v.B./R.K.

Appeal decreed.

1. (1905) 27 All 704.

2. (1900) 22 All 199.

A. I. R. 1918 Allahabad 184

TUDBALL AND RAFIQUE, JJ.

Mt. Bhana and another—Defendants
—Petitioners.

v.

Guman Singh and others—Plaintiffs—
Opposite Parties.

Civil Misc. Ref. No. 421 of 1917, Decided on 5th February 1918, made by Under Secretary to Government, United Provinces.

Registration Act (1908), S. 17—Agreement by reversioner not to enforce right to declaration as to gift by widow is not compulsorily registrable.

An agreement by the reversioners of a deceased Hindu not to enforce their right to a declaration in respect of a gift of the property of the deceased made by the latter's widow is not a document conveying any right, title or interest or purporting or operating to extinguish any right, title or

interest vested or contingent, in immovable property and is not therefore compulsorily registrable. [P 185 C 1, 2]

La'shmi Narain—for Petitioners.

Damodar Das—for Opposite Parties.

Judgment.—This is a reference under R. 17 of the rules and orders relating to the Kumaun Division of 1894. The facts are simple. Mt. Bhana, a Hindu widow having a widow's estate, executed a deed of gift in favour of her husband's sister's sons. The plaintiffs are the presumptive reversioners. After the deed of gift had been executed they were preparing to bring a suit for a declaration that the deed of gift was not binding upon them. The donees and the plaintiffs came to terms. The plaintiffs executed an agreement in favour of the donees, under which they agreed not to enforce their right to the declaration which they were about to seek in consideration of the donees transferring to them half of the property and also undertaking to support Mt. Bhana for the rest of her life and to pay off her debts. The donees executed an agreement at the same time, under which they agreed that they would transfer half the property to the plaintiffs and would support Mt. Bhana and pay her debts. In spite of this agreement the plaintiffs have brought the present suit, in which they ask for a declaration that they are heirs to the property and that the deed of gift should be set aside as against them. The Court of first instance held that in view of the agreement the plaintiffs' suit was barred, and dismissed it, the defendants being fully willing to carry out their terms of the contract. The plaintiffs appealed. The appellate Court held that the agreement ought to have been registered under S. 17, Registration Act, and as it had not been registered, it was not admissible in evidence and this evidence having vanished, it gave the plaintiffs a declaration that the deed of gift was not binding upon them.

We are asked our opinion as to whether the decree passed by the Commissioner was correct, and if not, what decree should have been passed in the case. We have examined the agreement. In our opinion it was not compulsorily registrable under S. 17, Registration Act. It conveyed no right, title or interest nor did it purport or operate to extinguish any right, title or interest, vested or

contingent, in immovable property of the value of Rs. 100. All that the plaintiffs agreed to do was to forgo their right to sue for a declaration for a certain consideration. As reversioners they had no transferable right, title or interest in the property, nor did they purport to transfer any such right. They simply agreed not to sue for the declaration for which they have now sought by this suit in Court. The document was clearly admissible in evidence. In the circumstances of the case as stated above, we think that the plaintiffs' suit was rightly dismissed by the Court of first instance. It is nowhere alleged that the defendants have refused to carry out their agreement. In the course of the suit the defendants expressed their willingness to be faithful to their word. There was consideration for the agreement and we think that the plaintiffs were bound thereby. In our opinion the decree of the appellate Court should be set aside and that of the Court of first instance should be restored and the defendants should have their costs in all Courts including the costs of this reference. The costs in this Court will include Rs. 50, pleaders' fees of the defendants.

V.B./R.K.

Appeal decreed.

A. I. R. 1918 Allahabad 185

TUDBALL, J.

Lakhan Singh—Plaintiff—Appellant.

v.

Ram Kishen Das—Defendant—Respondent.

Stamp Ref. in First Appeal No. 186 of 1917, Decided on 13th November 1917.

Court fees Act (7 of 1870), Art. 1—Cross-objection—Ad valorem fee on amount claimed is payable.

Under Art. 1, a cross-objector must pay an ad valorem fee according to the value or amount of the subject-matter in dispute. [P 186 C 1]

Judgment.—In this case the plaintiff brought a suit asking for certain declarations. The suit was partly decreed and partly dismissed. The plaintiff appealed against so much of his claim as was disallowed and he paid a court-fee of Rupees 10. The defendant filed no appeal, but on receiving notice of the plaintiff's appeal, he filed cross objections on a stamp of Rs. 2. The taxing clerk made a report to the effect that the cross-objection should bear a court fee stamp of Rs. 10 just as if the respondent had appealed, apparently applying the ana-

logy of Art. 17, Sch. 2, Court-fees Act. The taxing officer is doubtful as to the accuracy of this and he has sent the case on to me as Taxing Judge for my decision. He has pointed out that the only place in the Court-fees Act in which cross-objections are mentioned is in Art. 1, Sch. 1 of the Act. Under that article the cross-objector must pay an ad valorem fee according to the value of the subject-matter in dispute. Art. 17, Sch. 2, though it relates to a plaint or memorandum of appeal in the classes of suits mentioned therein, does not relate to cross-objections filed in similar suits. This Act was amended when Act 5 of 1908 was passed and the words "or cross objections" were added to Art. 1, Sch. 1, but not to Art. 17, Sch. 2. Under the former article the cross-objector must pay an ad valorem fee according to the value or amount of the subject-matter in dispute. In the present case the respondent has valued the relief which he seeks in his cross-objection at Rs. 1,000. He must therefore pay this large fee when the appellant in the case can appeal on payment of only Rs. 10. It appears to me that this is perhaps due to an oversight at the time when Act 5 of 1908 was passed in not adding the words "or cross-objection" to Art. 17, Sch. 2. I allow the respondent three weeks within which to make good the deficiency.

V.B./R.K. *Order accordingly.*

A. I. R. 1918 Allahabad 186 (1)

RICHARDS, C. J. AND BANERJI, J.

Dhara Singh—Defendant—Applicant.

v.

Gayan Chand — Plaintiff— Opposite Party.

Civil Revn. No. 196 of 1917, Decided on 22nd April 1918, from decree of Sub-Judge, Meerut.

Civil P.C. (1908), S. 115—Mistake of law is no ground for revision.

Where a Court has jurisdiction to determine a matter and in the exercise of its jurisdiction it makes a mistake in law, that does not entitle the party against whom the decision is given to come to the High Court in revision. [P 186 C 2]

Plaintiff brought a suit on a promissory note executed by the defendant. Defendant pleaded infancy whereupon the Court of first instance dismissed the suit. On appeal the Subordinate Judge found that the plaintiff was a minor but that he had fraudulently misrepresented his age so that he was estopped from setting up his minority as a defence. It therefore decreed the

suit. The suit being of small cause nature, the defendant applied in revision to the High Court:

Held: that the lower appellate Court was wrong in holding the minor liable on the finding of fact arrived at by it, but that the mistake being a mere mistake of law the High Court could not interfere in revision. [P 186 C 2]

Kailas Nath Katju for *Tej Bahadur Sapru*—for Applicant.

Radha Kant Malaviya for *Baldev Ram Dave*—for Opposite Party.

Judgment.—A preliminary objection has been taken to the hearing of this application. The suit was brought upon a promissory note. The defendant pleaded that he was a minor at the date of the note. The Munsif held that he was a minor and dismissed the suit. In appeal the Subordinate Judge found that the defendant was a minor but that he had fraudulently misrepresented his age to the plaintiff and on this ground reversed the decision of the Munsif and decreed the suit. The preliminary objection is that the suit being of the nature cognizable by a Small Cause Court, the Code does not provide for a second appeal and that the defendant is not entitled to apply in revision under the provisions of S. 115. It is quite clear that the Court had jurisdiction to determine the matter and in exercise of its jurisdiction, if it made a mistake in law, this does not entitle the party against whom the decision is to come here in revision. We may mention that the Court was clearly wrong in holding the minor liable on the promissory note on the finding of fact arrived at by it. We reject the application but under the circumstances we make no order as to costs.

V.B./R.K. *Application rejected.*

A. I. R. 1918 Allahabad 186 (2)

WLASH, J.

Sundar Nath—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 83 of 1918, Decided on 28th January 1918, from order of Magistrate, First Class, Gorakhpur.

(a) Government of India Act (1915), S. 107—S. 107 cannot be invoked to question proceedings lawfully taken under Ch. 12, Criminal P. C.

Section 107, Government of India Act, cannot be invoked so as to question proceedings which purport to be proceedings lawfully taken by a Magistrate under Ch. 12, Criminal P. C.

[P 187 C 1]

(b) Criminal P. C. (1898), Ss. 145 and 435 (3)—Proceedings without legal founda-

tion taken in name of proceedings under Ch. 12—High Court can interfere.

If proceedings totally without legal foundation or legislative authority are taken by a Magistrate in the name of proceedings under Ch. 12 but not seriously purporting to be taken under or to comply with the provisions of that chapter and the High Court is satisfied of that fact by reliable evidence, there is clearly a case for interference. It is always open to a party in such a case to satisfy the High Court that the property of which he is entitled to possession has been dealt with by an order which has no legal authority at all, and he may do so by an affidavit or in any other reliable manner, and thereby invoke the superintending power of the Court, but he cannot ask the High Court to interfere in revision or to send for the record merely by showing that on the face of the judgment the Magistrate has neglected or misinterpreted some of the provisions of the chapter. [P 188 C 1]

Satya Chandra Mukerji — for Applicant.

Judgment.—I have no power to send for the record in an application for revision relating to proceedings under Ch. 12, Sub-S. (3), S. 435, Criminal P. C., absolutely prohibits that course. The law as laid down by the general current of authorities in this Province is that the superintendence section, which is now S. 107, Government of India Act, cannot be invoked so as to question proceedings which purport to be proceedings lawfully taken by a Magistrate under Ch. 12. It is well recognized that there is an irreconcilable difference of opinion on this point between some of the High Courts, notably two recent judgments, one delivered by my brother Knox and one delivered in Patna by the former Chief Justice of the Patna High Court based upon the course of authorities. It is obvious that having regard to the view established in this Province it is difficult to question proceedings of this kind at all. It has been said that proceedings which purport to be under Ch. 12 may be improperly taken, improperly brought or conducted, and therefore may be treated as if they were no proceedings under the chapter. This view is not a sound one and has been frequently dissented from, even by the Privy Council in cases of awards where the arbitrators so long as they act within their jurisdiction are masters of the situation. It has been sought by persons trying to get rid of an award to say that, if they have gone wrong either in law or procedure or something of that kind other than misconduct, although there is no appeal, the award is bad and

therefore no award at all. In the same way it is sought to argue that proceedings under Ch. 12 where for example all the proper parties are not required to attend Court and so forth, being proceedings which are defective and therefore bad may be treated as though they were no proceedings at all. I think it is impossible to give effect to this view and there is the further difficulty as pointed out by Knox, J., that this cannot be determined without sending for the record. This is just what this Court cannot do.

On the other hand there is the difficulty in the other point of view, viz., that though the legislature had vested in this Court a complete discretionary power of superintendence to check irregular proceedings of inferior Courts which may result in serious injury or injustice, if the view which I have just stated is correct—the view with regard to the sending for record or otherwise inquiring into proceedings under Ch. 12—the jurisdiction of this Court to superintend proceedings under Ch. 12 may become a dead letter. I think that this is not necessarily so. There is at any rate one way in which it seems to me both views may be reconciled. If proceedings totally without legal foundation or legislative authority are taken by a Magistrate in the name of proceedings under Ch. 12 but not seriously purporting to be taken under, or to comply with, the provisions of that chapter and this Court is satisfied of that fact by reliable evidence, then I think there is clearly a case for interference. I myself interfered in one case which seemed to be a palpable and serious misunderstanding of the powers conferred by this section, where the Magistrate had not even had a report at all which dealt with any question of the breach of peace so that the legal foundation for his authority had never been laid, and in interfering in that case I adopted the dictum of Sir John Stanley who seemed to think that the superintendence section could be applied to any circumstances to which revision would apply if it had not been expressly excluded.

Somehow or other in that case, I do not know how the circumstances were before me, because the record had been sent for and the application had been admitted. It is always open to a party in such a case as this to satisfy the High

Court that the property of which he is entitled to possession has been dealt with by an order which has no legal authority at all, and he may do so by an affidavit or in any other reliable manner, and thereby invoke the superintending power of the Court, but I do not think he can ask this Court to interfere in revision or to send for the record, merely by showing that on the face of the judgment the Magistrate has neglected or misinterpreted some of the provisions of the chapter. The application is rejected.

V.B./R.K. *Application rejected.*

A. I. R. 1918 Allahabad 188*

RICHARDS, C. J. AND TUDBALL, J.

Shamsher Singh and others — Defendants — Appellants.

v.

Pearey Dut and others — Plaintiff and — Defendants — Respondents.

First Appeal No. 255 of 1916, Decided on 9th July 1918, from decree of Sub-Judge, Mainpuri, D-/ 23rd September 1916.

Pre-emption—Custom—Right to pre-empt by cosharer — Refusal to purchase by cosharer—Vendor is entitled to sell to stranger and need not offer to cosharer second time.

Where the custom of pre-emption proved is that when a cosharer wishes to sell he must first offer the property to his cosharer and if the cosharer refuses to purchase he is entitled to sell it to a stranger, the owner of the property is quite entitled to go and sell it to a stranger if on his offering it to his cosharer the latter refuses to purchase on the ground that he has no money or is unwilling for any other reason to purchase, and the owner is not bound after he has made a definite agreement with a stranger to return and offer the property to the cosharer a second time. [P 183 C 2]

A. H. Hamilton, Tej Bahadur Sapru, and Peary Lal Banerji—for Appellants.

T. N. Chandha and Girdharilal Agarwala—for Respondents.

Judgment.—This appeal arises out of a suit for pre-emption and was before us on a previous occasion. We held that the plaintiff, under the circumstances of the case, was entitled to get the property by pre-emption provided that he had not refused to purchase it. The Court below has decided that the plaintiff did not refuse to purchase. The Court disbelieves the evidence adduced by the vendees upon this point and it is to be remembered that although the plea was raised when the case came on originally for trial, it was not until after the order for remand that evidence of refusal to pur-

chase was given. We see no reason to differ from the Court below upon the issue of the refusal to purchase. The learned Subordinate Judge in the course of his judgment held that even if the plaintiff had refused to purchase that would not be sufficient to debar him from his right of pre-emption, and has cited two cases, namely, *Munawar Husain v. Khadim Ali* (1) and *Kanhai Lal v. Kalka Prasad* (2). In the last mentioned case there is the following passage in the judgment :

"As we pointed out in our judgment in the case of *Sohan Lal v. Shahab-ud-din Khan* (3), in order to debar a party entitled to pre-empt a sale from exercising his right, an opportunity to purchase must be given when a definite agreement to purchase at a fixed price has been entered into with a stranger. It is not enough to offer property to a person entitled to pre-empt before an agreement to purchase has been entered into with a third party as was the case here."

This Bench has had occasion to deal with this dictum in several cases : see *Naunihal Singh v Ram Ratn* (4) and *Nathi Lal v. Dhani Ram* (5). As a general rule the custom, as evidenced by the record in the *wajibularz*, is that where a cosharer wishes to sell he must first offer it to his cosharer and if the cosharer refuses to purchase, he is entitled to go to a stranger. Where the custom proved is of this nature we have no hesitation in saying that if the cosharer offers the property to another cosharer and he refuses to purchase upon the ground that he has no money or is unwilling for any other reason to purchase, the owner of the property is quite entitled to go and sell it to a stranger and that he is not obliged after he has made a definite agreement with the stranger to return and offer the property to the cosharer a second time. It seems to us that (where the custom is as stated) the going to a stranger and making a bargain with him before offering it to the cosharer would be acting contrary to the custom. We dismiss the appeal with costs including in this Court-fees on the higher scale.

V.B./R.K. *Appeal dismissed.*

1. (1908) 5 A L J 331.
2. (1905) 27 All 670.
3. S A No. 909 of 1901 unreported.
4. (1917) 39 All 127=37 I C 511.
5. (1917) 39 I C 637.

A. I. R. 1918 Allahabad 189

PIGGOTT, J.

Yusuf Husain—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 736 of 1917, Decided on 8th January 1918, from order of Sess. Judge, Allahabad.

(a) Penal Code (1860), Ss. 97, 324 and 334—Accused set upon and assaulted by complainant—Struggle ensuing—Accused wounding complainant with sharp weapon is guilty under S. 334.

Accused was coming along the road on his bicycle when he was set upon and assaulted by the complainant. He fell off the bicycle on to the ground with the complainant on top of him. In the struggle which ensued the accused wounded the complainant in the breast with a sharp knife:

Held: that the accused was guilty of an offence under S. 334 inasmuch as he acted under grave and sudden provocation. [P 192 C 1]

(b) Penal Code (1860), S. 97—Limitation of right of private defence.

The right of an accused person to defend himself upon a criminal charge can only be limited by the provisions of the Statute Law.

[P 190 C 1]

(c) Criminal Trial—Defence—Person accused of culpable homicide—He can set up alternative defence, namely, that he was not present at occurrence and if he failed to satisfy Court of this fact he could show that he was acting in private defence—Evidence Act (1872), S. 105.

There is nothing in law to prevent a man on his trial on a charge of culpable homicide from setting up an alternative defence, e. g., first, that he was not present at the occurrence referred to by the prosecution witnesses and that they were giving false evidence against him; secondly, that even if he had failed to persuade the Court of this fact, he could show from the statements of the prosecution witnesses themselves that if he had caused the death of any person in the manner and under the precise circumstances deposed to by them, he was acting in the lawful exercise of a right of private defence. [P 190 C 1]

G. W. Dillon and *Peary Lal Banerji*—for Appellant.

Lalit Mohan Banerji—for the Crown.

Judgment.—On 26th June last, in the morning, in a frequented part of the city of Allahabad, a scuffle took place between Yusuf Husain, who is the appellant now before this Court, and one Musi Raza. The two men came to the ground, the appellant being underneath and Musi Raza uppermost. When the scuffle ended Musi Raza was found to be bleeding profusely from wounds in the chest. There were two distinct wounds, one of which was on the right side of the chest and the other on the left, over the region of the heart. The wound on the right side was long and superficial and so

far as the medical evidence goes, might have been caused by the knife or other weapon which had just inflicted the wound on the right side slipping along the body. The wound on the left side was of a peculiar character and seems to have honestly puzzled the Medical Officers who examined it. The most remarkable feature about it was that it was angular in shape with two distinct limbs each about three quarters of an inch long. The Medical Officer whose evidence appears the more reliable was of opinion that this wound had most probably been inflicted with a knife, but that both the injuries on the chest looked as if they had been caused by a single blow, the knife having slipped round after penetrating and then slid along the body in the course of a scuffle. It so happened that the wound on the left side while dangerous, did not prove fatal. The pleural cavity was not penetrated and though one of the minor arteries was severed and there was serious effusion of blood, at one time threatening to prove dangerous to life, the injury yielded to skilful treatment and Musi Raza recovered. Yusuf Husain was committed for trial on a charge framed under S. 307, I. P. C. The learned Sessions Judge has found that Yusuf Husain stabbed Musi Raza with a knife, that he did so with intent to cause death, or at least to cause such bodily injury as he knew to be likely to result in death; but that even if death had resulted the case would have been covered by Excep. 1 to S. 300, I. P. C., in that Yusuf Husain had acted under sudden and grave provocation.

He has accordingly convicted the appellant under S. 303, I. P. C., and has sentenced him to rigorous imprisonment for three years. The memorandum of appeal to this Court, apart from calling in question the severity of the sentence, raises two distinct pleas. The first is whether the prosecution evidence, even if accepted at the value put upon it by the learned Sessions Judge, justifies a finding that the appellant intended to cause death or even injury likely to result in death. The other is that the appellant was acting in the lawful exercise of his right of private defence and is completely protected by the provisions of S. 97, I. P. C. On this latter point there has been considerable argument before me. With regard to the legal aspects of the case, I have been referred more particularly to three reported

cases of this Court; *Queen-Empress v. Prag Dat* (1), *Queen-Empress v. Timmal* (2), *Emperor v. Gullu* (3). The first of these rulings seems to have only a remote bearing on the facts now before me. It lays stress upon the provisions of S. 105, Evidence Act, and there can be no doubt whatever that, if the present appellant is to secure an acquittal on the ground that he acted in the exercise of his lawful right of private defence, it must be because the Court finds this affirmatively, after laying the burden of proof on the accused person.

With regard to the second of these two cases, it seems to me that the head-note goes very considerably beyond anything that was decided in the case itself. The learned Judges did not confine their consideration of that case to the fact that the right of private defence had not been pleaded by the persons whose case they were considering. The contention before them on behalf of the prosecution did not limit itself to this fact, but it was pleaded: "further that there was no evidence on the record upon which any circumstance could be inferred which would substantiate a plea of private defence."

This was the contention which found favour with the Court and upon which the case was definitely decided. There is nothing to the contrary in the third of the cases to which I have above referred. The right of an accused to defend himself upon a criminal charge can only be limited by the provisions of the Statute Law, and in this case the provisions to be considered are those of S. 105, Evidence Act, already referred to. I cannot see anything in the law to prevent a man on his trial on a charge of culpable homicide from setting up an alternative defence on some such lines as these:

"Firstly, I was not present at the occurrence referred to by the prosecution witnesses and they are giving false evidence against me; secondly, even if I fail to persuade the Court of this fact, I can show from the statements of the prosecution witnesses themselves that, if I had caused the death of any person in the manner and under the precise circumstance deposed to by their evidence, I should have been acting in the lawful exercise of a right of private defence."

Now in the present case the accused has done something like this, but not precisely this. He said that he was coming along the road on his bicycle when he was set upon and assaulted by Musi Raza, that he fell off his bicycle on

to the ground and Musi Raza on top of him, the two of them being mixed up with the bicycle which fell to the ground at the same time. Musi Raza received his injuries in the course of this fall and they must presumably have been caused by some portion of the bicycle. The defence as thus set up was not substantiated by the evidence. If it were necessary for me to go into the matter, I could give my reasons for concurring in the finding of the learned Sessions Judge that Musi Raza was not injured by falling on the bicycle but that he was struck in the chest by the appellant Yusuf Husain holding a pen-knife or some similar implement in his hand. I do not feel called upon to go into this question in detail, because the appeal has been argued before me, in substance upon the admission that this was what actually happened. It is unfortunate that Yusuf Husain was not sufficiently well advised to have admitted this fact frankly in the trial Court.

The result has been to involve him in the necessity for arguing two inconsistent defences on which stress is laid in more than one of the rulings to which I have just referred. He endeavoured to support his position by calling a number of witnesses, and these witnesses themselves laboured under the disadvantage which the accused had imposed on the entire conduct of the defence. They gave evidences as to the circumstances under which the affray between the two men commenced which evidence has in the main been accepted by the trial Court in preference to that of the prosecution witnesses. They described Musi Raza as the aggressor and as having set upon Yusuf Husain while the latter was riding by on his bicycle. They said that the two men fell together on the ground with Musi Raza uppermost; but there they had to stop, unless they were to give away the defence principally relied upon at the trial. None of the defence witnesses would admit that he saw Yusuf Husain strike a blow with any weapon or instrument whatsoever. They could only say that when the two men stood up Musi Raza was bleeding at the chest.

The defence evidence given under these limitations cannot be relied upon further than it has been by the learned Sessions Judge himself. It was not accepted even by the assessors who would have preferred to find the accused not

1. (1898) 20 All 459.

2. (1899) 21 All 122.

3. (1904) A W N 113=1 Or L J 427.

guilty. They were both of opinion that the injuries on Musi Raza's person were caused by a blow or blows struck by Yusuf Husain. On the principles already laid down the only question which remains is whether the plea of private defence can be made out on the evidence of the prosecution witnesses themselves. I have to criticise that evidence in connexion with the other plea taken in the memorandum of appeal and I need not anticipate those criticisms. It is sufficient for me to say that even the evidence of the witness Safdar Husain, who is certainly the most reliable of the prosecution witnesses, falls short of making out a satisfactory answer to the charge on the ground of private defence. He admits that he saw the two men struggling on the ground, that Yusuf Husain was underneath with Musi Raza on the top of him and that Musi Raza had his hands one on the back of the accused's neck and one underneath it; then he says he saw two distinct blows struck by the accused, inflicting stabs on the chest of his opponent. We have no statement from Yusuf Husain himself that he was being throttled, that the pressure upon his neck was such as to inspire him with fear for his own life; in fact, we have no exposition from the accused himself of the motives for his action. On the evidence therefore as it stands I am not prepared to find that the right of private defence of the person in favour of Yusuf Husain even admitting such right to have arisen in consequence of an assault commenced by Musi Raza was not vitiated by the fact that harm was caused more than was necessary for the purposes of defence.

At the same time I think that the case comes very near the limit and that it is at least possible that a full defence on these lines might have been made out if the appellant had been better advised at his trial. It does not seem to me at all necessary to take as serious a view of this case as has been done in the Court below. The prosecution evidence is scanty to a degree. The statement of Musi Raza is corroborated by two witnesses only—Safdar Husain and a woman named Mt. Sakina. The learned Sessions Judge has distrusted the evidence of the woman, and I think it sufficient to say that the record discloses abundant grounds for putting her statement aside as altogether

unreliable. The long and short of the matter is that Musi Raza elected to come into Court with a version of the facts which diverges very widely from the truth as regards the origin and commencement of the affray. He found it difficult to get any witness to support his false statements on this point. The learned Sessions Judge remarks that the investigating police officer found it difficult to obtain evidence because the sympathies of persons in the neighbourhood seemed to be with Yusuf Husain.

He does not appear to have adequately appreciated the importance of this remark. What the investigating officer found difficult to obtain was evidence supporting Musi Raza's version of the facts and his difficulty arose simply from the fact that the shopkeepers of the neighbourhood saw no adequate reason for perjuring themselves to oblige Musi Raza. Their sympathy for the accused amounted to mere disinclination to see him involved in a serious charge upon a version of the facts which they knew to be in material points untrue. When a number of them finally decided to come in Court as witnesses for the defence, they unfortunately thought themselves to be precluded, under the circumstances already referred to, from telling the whole truth; but their version of the commencement of the affray has been in substance accepted by the trial Court. The result of this is that Musi Raza has been disbelieved by the learned Sessions Judge in very material parts of his evidence and, this being the case, I do not find myself able to follow the learned Sessions Judge in accepting as established beyond reasonable doubt Musi Raza's version as to the particular manner in which he was struck by the accused. The medical evidence is not merely consistent with the assertion that only one blow was struck, but it tends to make that assertion probable. The appearance of the wounds as described by that Medical Officer, whose evidence I agree with the learned Sessions Judge in accepting as reliable, suggests that the theory formed by that officer as to the manner in which the injuries were caused is probably correct.

I think it quite unlikely that Musi Raza is speaking the truth when he says that the superficial cut on the right side of his chest was inflicted first and was

followed by a stab aimed directly at his heart. It is true that Musi Raza's statement on this point is to some extent corroborated by the evidence of Safdar Husain. The latter speaks of two distinct blows being struck, though of course he cannot say which of the two injuries was caused by which blow. In some respects Safdar Husain has shown himself an impartial witness and I do not see that the learned Sessions Judge was in any way justified in rejecting that portion of his evidence which bears out the statements of the defence witnesses as to the position of Musi Raza's hands at the moment when the accused struck him. It must be remembered however that this witness is admittedly a friend of Musi Raza and that his account of the manner in which the affray commenced has been rejected by the learned Sessions Judge, who has preferred the version given by the defence witnesses. It seems to me that to hold that Yusuf Husain struck two blows at his assailant, or even to hold that the curiously shaped injury on the left side of Musi Raza's chest was the result of a blow intentionally aimed at that portion of his anatomy, is to place an unwarranted degree of reliance on the veracity of Safdar Husain and on his opportunities of observing precisely what took place in what must have been a very brief scuffle.

In my opinion the prosecution evidence fairly considered, so far from warranting the conclusion that when Yusuf Husain struck at Musi Raza with the pen-knife, or whatever other implement he had about his person at the time, he did so with the intention or knowledge referred to in S. 299, I. P. C., does not even justify the conclusion that the hurt which he intended to cause or knew himself likely to cause was grievous hurt, reference being made to the provisions of S. 322. The offence committed, therefore, would be that made punishable by S. 324, were it not for the fact that the appellant acted on grave and sudden provocation. This has been found by the learned Sessions Judge himself and I agree with him. The offence committed therefore must be reduced to one punishable under S. 334, I. P. C. The result is that I set aside the conviction and sentence in this case, convict Yusuf Husain of an offence punishable under S. 334, I. P. C., and sentence him to pay a fine of Rs. 100. I

allow one week within which the fine may be paid, the appellant's security remaining in force till that period. In default of such payment the appellant will suffer simple imprisonment for a period of one month.

V.B./R.K.

*Conviction altered ;
Sentence reduced.*

A. I. R. 1918 Allahabad 192

RICHARDS, C. J. AND BANERJI, J.

Fazal Rab—Applicant.

v.

Manzur Ahmad and others—Opposite Parties.

Civil Revn. No. 190 of 1917, Decided on 5th March 1918, from order of Sub-Judge, Allahabad.

(a) Civil P. C. (1908), O. 21, Rr. 89 and 92—Whether R. 89 is complied with or not is question which Court has jurisdiction to decide and no revision lies even if its decision is erroneous—Judgment-debtor depositing money in treasury as Court was closed—Court refusing to set aside sale on ground that deposit had not been made in civil Court—Court had jurisdiction to decide whether deposit had been made in Court—No revision is competent even if decision is wrong.

The deposit under O. 21, R. 89 of the purchase money plus 5 per cent compensation to the auction-purchaser, is an indulgence to the judgment-debtor. The auction-purchaser is entitled to the benefit of his purchase unless the rule is strictly and completely complied with. Whether or not the section has been completely complied with, is a question which the Court has jurisdiction to decide and if in the exercise of such jurisdiction it comes to an erroneous conclusion, the High Court is not entitled to interfere with its order in revision. [P 193 C 2]

A judgment-debtor deposited the sum necessary for getting a sale set aside under O. 21, R. 89, in the treasury owing to the civil Court being closed on that day. On the re-opening of the Court he applied under the above rule, stating that he had already deposited the money in the treasury. The Court refused to set aside the sale on the ground that the deposit had not been made in the civil Court :

Held : that as the word "Court" in O. 21, R. 89, means civil Court, the Court had jurisdiction to decide whether the deposit had been made in Court and that the order of the Court, even if it was erroneous could not be interfered with in revision. [P 193 C 2]

(b) Civil P. C. (1908), O. 21, Rr. 89 and 92—Sale set aside—Auction-purchaser has right to appeal.

The Code gives a right of appeal to an auction-purchaser against an order setting aside a sale, as he is the party mainly affected by the order. [P 193 C 2]

(c) Practice—Appeal—High Court cannot allow appeals put forward as revision.

The High Court is not entitled to create what are really appeals put forward in the shape of revisions. [P 193 C 2]

Kailas Nath Katju and Peary Lal Banerji—for Applicant.

S. M. Sulaiman and T. N. Chadha—for Opposite Parties

Judgment. — The facts connected with this application may be stated very shortly. There was a decree for about Rs. 1,000. Certain property of the judgment-debtor was directed to be sold. The sale was held by the Collector on behalf of the civil Court. The sale took place on 20th September 1916. The property was put up to sale and fetched Rs. 850. On 15th October the judgment debtor came to the Collector and stated that he was anxious to have the sale set aside and to save the property; that he could not deposit the decretal amount plus 5 per cent compensation to the auction-purchaser as the civil Court was closed but he was anxious to lodge the money in the Treasury. The money was accepted by the Collector. On 11th November, which was the day on which the civil Court opened, the judgment debtor applied to have the sale set aside and stated how the money had been already deposited in the Treasury. There was a Rubkar from the Treasury to the effect that the money had been deposited. In December following the civil Court directed that the money should be transferred to the account of the civil Court. The Court of first instance, thereupon set aside the sale, holding that the money had been deposited within 30 days. The auction-purchaser appealed and the lower appellate Court held that the money had not been deposited within 30 days or on 11th November, which was the day on which the civil Court opened, and accordingly the rule had not been complied with and the auction-purchaser was entitled to the benefit of his purchase. The judgment-debtor has applied in revision. There is no appeal from the order of the lower appellate Court refusing to set aside the sale. It is contended in the first place, that the money was in fact deposited within the meaning of the rule and that consequently the lower appellate Court had no jurisdiction to refuse to set aside the sale, and in the second place that the Court of first instance having set aside the sale no appeal by the auc-

tion purchaser lay to the lower appellate Court. R. 89 provides :

"Where immovable property has been sold in execution of a decree, any person either owning such property or holding an interest therein by virtue of a title acquired before such sale, may apply to have the sale set aside on his depositing in Court (a) for payment to the purchaser a sum equal to 5 per cent of the purchase money, and (b) for payment to the decree-holder, the amount specified in the proclamation of sale as that for the recovery of which the sale was ordered, less any amount which may, since the date of such proclamation of sale have been received by the decree-holder.

Rule 92, Cl. 2, provides :

"That where in an application under R. 89 the deposit required by that rule is made within 30 days from the date of the sale, the Court shall make an order setting aside the sale."

The question which the Court below had to decide was whether or not the money had been deposited in Court. It is quite clear that Court means the civil Court. This was a question which admittedly the lower appellate Court had not only jurisdiction but was bound to decide. It is somewhat difficult to say whether the Court was not technically right in holding unfortunate though the judgment-debtor may have been, in strictness that the money was not deposited in Court within 30 days or on 11th November, which was the first day the Court opened. It was not until December following that the money was accepted in the civil Court by ordering the transfer of the deposit to the civil Court account. It has been decided by their Lordships of the Privy Council that the High Court is not entitled to create what are really appeals put forward in the shape of revisions and accordingly even if we thought that under the exceptional circumstances of this case the lower appellate Court might very well have upheld the Court of first instance, this would not justify us in interfering with the decision of the lower appellate Court in revision.

In this connexion it must be remembered that the deposit of the purchase-money plus 5 per cent compensation of the purchase-money to the auction-purchaser is an indulgence to the judgment-debtor. The auction purchaser is entitled to the benefit of his purchase unless the section has been strictly and completely complied with. We think that the question whether or not the section has been complied with completely was clearly a question which the Court below had jurisdiction to decide, that it exercised its jurisdiction

and that even if we thought it had come to an erroneous conclusion, we would not have been entitled to interfere in revision. As to the second contention, namely, that an auction-purchaser has no right to appeal, the Code undoubtedly gives a right of appeal against an order setting aside the sale. The party mainly affected by the setting aside of the sale is the auction-purchaser and the Code provides that the sale should not be set aside without notice to him. We think it would be most unreasonable to hold that the Code restricts the right of appeal to the decree-holder or judgment-debtor. We think the application fails and we accordingly dismiss it with costs.

V.B./R.K. *Application dismissed.*

A. I. R. 1918 Allahabad 194 (1)

TUDBALL AND RAFIQUE, JJ.

Muhammad Farzand Ali—Plaintiff—Applicant.

v.

Rahat Ali and others—Defendants—Opposite Parties.

Civil Revu. No. 129 of 1917, Decided on 5th February 1918, from order of Dist. Judge, Meerut.

Civil P. C. (1908), O. 44, R. 1—Application under O. 44, R. 1, rejected under proviso—Applicant is entitled to pay court-fee on memorandum of appeal.

An application under O. 44, R. 1, Civil P. C., asking for leave to appeal in forma pauperis was rejected under the proviso to the rule. The applicant then filed a petition praying that he might be permitted to pay court-fees on his memorandum of appeal. The petition was rejected on the ground that the appeal had already been dismissed:

Held: (1) that what was rejected under the proviso to O. 44, R. 1, was the application for permission to appeal in forma pauperis, and that the memorandum of appeal was still before the Court, and (2) that the Court refused to exercise its jurisdiction in not allowing the court-fees to be paid on the memorandum of appeal.

[P 194 C 2]

Iqbal Ahmad—for Applicant.

Uma Shankar Bajpai for S.M. Sulaiman—for Opposite Parties.

Judgment.—The present applicant brought a suit in forma pauperis for possession of certain property which had been mortgaged. He sought to recover possession without payment of any sum of money. On 15th July 1916, the Court gave a decree for redemption of the mortgage on payment of Rs. 4,301-3-2. On 19th August he filed an application under O. 44, R. 1, together with a memorandum of appeal as directed therein asking

for permission to be allowed to appeal in forma pauperis. The appellate Court directed further inquiry by the Court of first instance into the alleged pauperism and on 15th February that the Court reported that the applicant was a pauper. On 17th February 1917, the Court then took action under the proviso to R. 1, O. 44. It examined the judgment and the decree and rejected the application under that proviso. Information of this was sent to the applicant by post and he received it on 17th March 1917. On 20th March 1917 the applicant filed a petition stating that he had received a post-card from the Court intimating that his application for permission had been rejected. He therefore prayed that he might be permitted to pay the court-fee on his memorandum of appeal. On this the lower Court passed the following order:

"Yesterday the applicant filed a petition requesting to be allowed to deposit fees and to prosecute his appeal. His appeal was dismissed on 17th February last. I reject his petition."

The Court therefore refused to exercise its jurisdiction in not allowing the court-fees to be paid, under the impression that the appeal had been dismissed on 17th February. This is clear wrong. The appeal had never been dismissed. The memorandum of appeal is still before the Court. On 17th February what was rejected was the application for permission to appeal in forma pauperis. We think that in the circumstances the applicant should have been allowed to pay the court-fees if he so wished, and we allow this application and direct the lower Court to allow this to be done. Any question of limitation that may arise will be decided by the Court in the usual way according to law. The Court below will fix a time within which the applicant will pay the court-fees. In regard to the costs of this application, they will be costs in the cause and will abide the result.

V.B./R.K. *Application allowed.*

A. I. R. 1918 Allahabad 194 (2)

PIGGOTT AND WALSH, JJ.

Collector of Moradabad—Plaintiff—Appellant.

v.

M. Maqbulul Rahman and others—Defendants—Respondents.

First Appeal No. 138 of 1916, Decided on 7th March 1918.

Registration Act (1908), Ss. 32, 33, 71, 73, 75 and 87—Mortgage-deed—Registration—Presentation by duly authorized agent—Mortgagor failing to appear, refusal by Registrar to register—Death of mortgagee—Widow applying for Registration—Order by Registrar under S. 75 (1)—Collector as Manager, Court of Wards subsequently sending document for registration with copy of order of Registrar—Document registered—Original presentation by agent is valid—Procedure adopted by Collector was sufficient compliance with requirements of S. 75 (2)—Irregularity if any was covered by S. 87.

A mortgage-deed was executed in favour of one S but before it could be registered S fell ill. Subsequently S executed a special power-of-attorney as required by S. 33 authorising one N to present the deed for registration on his behalf. Accordingly within the period prescribed by law N presented the deed for registration and the Sub-Registrar made an endorsement on the deed certifying its presentation by N under a special power-of-attorney authenticated in his office. The mortgagor however failed to appear and the Sub-Registrar therefore refused to register the deed. In the meantime S had died and his widow on behalf of his minor sons applied to the Registrar, who made an order under S. 75 (1), that the document should be registered. Within 30 days of this order the Collector in his official capacity as Manager of the Court of Wards, by whom the estate of the sons of S had been taken over for management, sent the deed to the Sub-Registrar with an official letter, enclosing also a certified copy of the order of the District Registrar. The Sub-Registrar on receipt of this communication took cognisance of the same as a presentation of the document, within the meaning of S. 75, Cl. (2), and proceeded to register the document accordingly.

(*Per Curiam*)—That the procedure adopted by the Collector after the order of Registrar directing registration of the deed was a sufficient compliance with the requirements of S. 75 (2); and even if the procedure was irregular, the irregularity was covered by S. 87. [P 198 C 1]

Per Piggott, J.—That the endorsement on the deed by the Sub-Registrar that it was presented by N under a special power-of-attorney registered and duly authenticated in his office entitled the Court to assume that the Sub-Registrar acted in the proper and lawful exercise of his powers under the proviso to S. 33, and that therefore the original presentation of the deed for registration by N was a proper and valid presentation under S. 32. [P 196 C 1]

Per Walsh, J.—What happens after the Registrar's order under S. 75 (1) directing registration of a document is pure machinery. Any form of presentation if it is supported by an application, which takes place on behalf of the presenter and is noted on the order in his favour, is sufficient for the purposes of Cl. (2), S. 75. [P 200 C 1, 2]

A. E. Ryves—for Appellant.

S. M. Sulaiman, Surendra Nath Sen and Gulzari Lal—for Respondents.

Piggott, J.—This was a suit on a mortgage, dated 20th November 1911. The persons impleaded are the mortgagor

and certain subsequent transferees. The mortgage was in favour of one Sahu Parshadi Lal. The evidence shows that before registration of the document had been effected the mortgagee fell ill. It seems a fair matter of inference that the mortgagor endeavoured to take advantage of this fact to defeat the registration of the document. On 3rd February 1912 a special power-of-attorney of the kind spoken of in S. 33, Registration Act (No. 16 of 1908) was registered at the office of the Sub Registrar of Moradabad, whereby the mortgagee Sahu Parshadi Lal purported to authorize a pleader, named Pandit Nanak Chand, to present the mortgage of 20th November 1911, for registration on his behalf. Accordingly, on 5th February 1912, within the period prescribed by law, the mortgage-deed in suit was presented for registration by the said Pandit Nanak Chand, purporting to act under the authority of the special power-of-attorney of 3rd February 1912. A question has been raised as to the validity of this presentation, and it is just as well to dispose of it at once.

The learned Subordinate Judge who tried this suit seems to have thought that, whatever the facts may have been, the plaintiff had been remiss in the matter of producing satisfactory evidence and that the Court had before it no evidence from which it was entitled to infer that Pandit Nanak Chand did hold a valid power-of-attorney under the provisions of S. 33 aforesaid, authorizing him to present this document for registration. I think the decision of the Court below on this point is clearly wrong. The document in suit was presented for registration at the office of the Sub-Registrar of Moradabad, the very same office in which the special power-of-attorney had been registered two days previously. In his endorsement on the deed in suit the Sub-Registrar certifies its presentation by Pandit Nanak Chand under a special power-of-attorney duly authenticated in his office. That certificate is evidence under the Registration Act of the truth of the facts therein stated. There is no reason whatever for presuming that it is in any way an incorrect statement of the facts. What has been contended before us is that the special power-of-attorney referred to in S. 33, Registration Act requires, not merely to be authenticated by the Sub-Registrar, but to be executed be-

fore him. The argument is that the certificate above referred to does not specify that the document in question had been executed before the Sub-Registrar. Moreover it is suggested that, on the evidence as to the illness of Sahu Parshadi Lal, it is fairly certain that he did not appear personally before the Sub-Registrar on 3rd February 1912. Had he been able to appear in person at the Sub-Registrar's office on that date, he would presumably have presented the mortgage of 20th November 1911 himself. This argument however overlooks the proviso to S. 33, Act 16 of 1908. We may take it from the evidence that Sahu Parshadi Lal was suffering from bodily infirmity at the time. Indeed the argument addressed to us on behalf of the respondents on this point assumes that Sahu Parshadi Lal was in fact unable by reason of bodily infirmity to attend in person at the Sub-Registrar's Office.

It was therefore open to the Sub-Registrar to attest the special power-of-attorney without requiring the personal attendance of the executant at his office, provided only that he satisfied himself that it had been voluntarily executed by the person purporting to be the principal. We have it from his certificate that the special power-of-attorney was not merely registered in his office but was duly authenticated by him. In this state of the evidence we are entitled to assume that the Sub-Registrar acted in the proper and lawful exercise of his powers under the proviso to S. 33 aforesaid. I think therefore there can be no doubt that the original presentation of the document in suit for registration on 5th February 1912 was a proper and valid presentation under S. 32, Act 16 of 1908. The mortgagee Sahu Parshadi Lal died on 8th February 1912, a few days after the presentation of the document before the Sub-Registrar. The mortgagor, the executant of the said document, failed to appear before the Sub-Registrar to admit execution of the same. As I have already suggested, I see no reason to doubt that he was purposely keeping out of the way. The Sub Registrar had no option but to treat the non appearance of the executant as a denial of execution and to refuse registration on that ground. We know that he did so. This refusal gave rise to a right on the part of any person claiming under such document, or the re-

presentative of any such person, to apply to the Registrar to establish his right to have the document registered. We know that such an application was in fact made to the Registrar of Moradabad. It has been made a grievance on the part of the respondents in this Court that the evidence on the record does not show with certainty by whom this application was made. We have been informed that the application was made on behalf of the mother of the two minor sons of Sahu Parshadi Lal, acting as their natural guardian.

It does not seem however in any way incumbent upon us to call for specific evidence on this point. We know that the Registrar had before him an application on which he proceeded to take action under the appropriate section of the Registration Act. He was satisfied that he had before him a valid application by or on behalf of, a person entitled to make the same. I do not see that we are called upon to inquire into the precise nature of that application, especially in the absence of any specific plea that it was made by the particular person not authorized to make it. The proceedings before the Registrar resulted in an order by him, under Cl. 1, S. 75, Act 16 of 1908, whereby he ordered the document to be registered. In the meantime the estate of the minor sons of Sahu Parshadi Lal had been taken under the management of the Court of Wards, and the Collector of Moradabad, in his official capacity as manager of the Court of Wards, became charged with looking after the interests of the minors in this matter. The Registrar's order for the registration of the document was dated 28th, June 1912. Within the preincribed period of 30 days, that is to say, on 23rd of July 1912, the Collector sent the document in suit to the Sub-Registrar with an official letter, enclosing also a certified copy of the order of the District Registrar. The Sub Registrar on receipt of this communication took cognizance of the same as a presentation of the document, within the meaning of S. 75, Cl. (2), Registration Act, and proceeded to register the document accordingly. The present suit was instituted on 23rd November 1914, the plaintiff being the Collector of Moradabad as Manager of the Wards in charge of the estate of the two minor sons of Sahu Parshadi Lal.

The defendants were the original mortgagor, who did not contest the suit, and a number of subsequent transferees. In the written statements filed by some of these men the plea was taken that the document sued upon had not been duly presented for registration within the requirements of the law, that its registration was consequently invalid and that it could not affect the property hypothecated. The Court below fixed a number of issues, but as between the plaintiff and the subsequent transferees it has tried out only the one issue as to the validity of the registration. Having come to a finding that the registration was invalid the learned Subordinate Judge has dismissed the plaintiff's claim altogether holding that, as a claim for a simple money debt against the original mortgagor the suit would be barred by limitation.

The appeal before us raises simply the question of the validity of the registration. In the earlier portion of this order I have taken occasion to dispose of two points which were incidentally argued. There remains the main substantial point in the appeal, namely whether the Sub-Registrar of Moradabad was right in treating this document as having been duly presented to him on 23rd July 1912, when he received it under cover of an official letter from the Collector of Moradabad. In dealing with this point I do not propose to refer to the numerous authorities which have been cited before us. The present case is clearly distinguishable on the facts from any of those authorities, in that it turns upon S. 75, and not exclusively upon S. 32, Registration Act. This was not a case in which the registration officers had never been lawfully seised of the document at all. There had been, as I have held, a valid presentation of the document in the first instance on 5th February 1912. Moreover there was in existence a positive order by the District Registrar that the document be registered. The only question therefore is whether the procedure adopted in carrying out that order was such as wholly to invalidated the registration which followed, or was at most an irregularity of procedure on the part of the Sub Registrar of Moradabad covered by S. 67, Registration Act. The provisions of S. 75 Cl. (2), of the Act are some what curiously worded. There is no such categorical imperative as is to be found in

S. 32, where it is laid down that, subject to certain exceptions, every document to be registered shall be presented by one or other of the persons described in the categories which follow. All that S. 75, Cl. (2), does is to empower the registering officer to register the document without such complete compliance as would otherwise be required with the provisions of Ss. 58, 59 and 60 of the Act, provided only it be duly presented to him within 30 days of the making of the Registrar's order.

The controversy before us has turned on the expression "duly presented." The Sub-Registrar's duty, when he received this document on 23rd July 1912, was no doubt to satisfy himself that it was being presented to him by a person claiming under the document. If the Collector of Moradabad had presented himself in person at the office, the Sub-Registrar would presumably have taken the Collector's word for it that the estate of the minor sons of the deceased mortgagee was now in his charge as manager of the Court of Wards and that he was entitled to prefer a claim under the document on behalf of the said minors, or he might have satisfied himself on this point by a reference to the notification in the official Gazette. What he had before him was an official letter on the authority of the Collector of Moradabad, claiming to be in charge of the estate of the minors and to be entitled to present the document for registration. The argument that the Collector's failure to present this application in person is a fatal defect in the registration of the document seems to me open to a *reductio ad absurdum*. Whoever the messenger may have been who carried the document in question along with the Collector's letter to the office of the Sub Registrar of Moradabad, the Collector could have given him formal authority to present the document by the execution of a special power-of-attorney; that special power-of-attorney, being an instrument executed by the Collector in his official capacity could have been registered on the strength of an official letter from the Collector without his personal attendance at the office under the provisions of S. 88, Registration Act.

On the principle that the greater includes the less it seems to be asking far less of the Sub-Registrar that he should

take cognisance of the Collector's official signature and designation to a letter informing him of the Collector's interest in the document in suit and presenting it for registration, than to ask him to accept a similar letter as proof of the fact that a particular document as for instance a power-of-attorney had been executed by the Collector. Under the circumstances of the case I think we are not straining the law in holding that the presentation of this document made on 23rd July 1912 was a sufficient compliance with the requirements of S. 75, Cl. (2) of the Act. Even if I do not think so, I should feel justified in regarding the action of the Sub Registrar in taking cognisance of certain facts on the strength of an official letter received from the Collector of the District, without requiring the personal attendance of that officer before him as at most a defect of procedure, curable by the provisions of S. 87 of the Act, I hold therefore that the finding of the Court below that the document in suit is invalid as a mortgage for want of due registration is incorrect and must be reversed. Although certain other issues have been disposed of in the judgment under appeal this was the main issue decided as between the plaintiff and the subsequent transferees and it was certainly a preliminary issue. As we have reversed the finding of the Court below on this point, I think the proper order to pass is that the decree of the Court below be set aside and the case returned to that Court for re-trial and disposal on the merits. We leave the costs of this appeal, which will include fees on the higher scale to be costs in the cause.

Walsh, J.—I agree. I think the case of the respondents is in attempt to apply the dicta of the Privy Council to a situation in respect of which they were certainly not uttered and to which I think, they are not applicable. I propose to cite authorities only for the purpose of showing the principles which have to be borne in mind and then to attempt to construe the somewhat complicated provisions in order to make them work, if possible naturally and easily. Now first with regard to the presentation by the pleader on 5th February. By the endorsement that presentation purports to have been made under the authority of a special power-of-attorney duly authenticated in the registration office

two days before. I feel a difficulty in applying the terms of S. 60, sub-S. (2), to that endorsement. The endorsement it seems to me is only evidence of the facts mentioned by it after the provisions of the section have been complied with and a certificate has been issued for registration. And, inasmuch as the very question which we have to decide is whether those provisions have been complied with as provided by S. 60, it looks to me somewhat like begging the question to apply S. 60, sub-S. (2), to this endorsement. There is a further difficulty strongly relied upon in argument by Dr. Sulaiman that it is only evidence of the facts mentioned in the endorsement and the endorsement does not, it so happens in this case, mention the fact of the execution of the power-of-attorney. And therefore although I agree in the conclusion at which my brother has arrived to be drawn from that endorsement, I do so for somewhat different reasons, I think it is in any case, apart from the provisions of the act an instance of the sort of case to which the old maxim of *omnia presumuntur rite et solemniter esse acta* ought to be applied and that view seems to me to be supported by a passage in a case under this Act of a similar nature decided in the Privy Council as long ago as 1877. In that case *Muhammad Ewaz v. Brijlal* (1) Sir Montague E. Smith delivering the judgment of their Lordships said:

"If the High Court is to be understood to mean that in all cases where a registered deed is produced, it is open to the party objecting to the deed to contend that there was an improper registration, that the terms of the Registration Act in some substantial respects have not been complied with, their Lordships think this is too broadly stated. Undoubtedly, it would be a most inconvenient rule if it were to be laid down generally, that all Courts, upon the production of a deed which has the Registrar's endorsement of due registration, should be called on to inquire, before receiving it in evidence, whether the Registrar had properly performed his duty. Their Lordships think that this rule ought not to be thus broadly laid down. The registration is mainly required for the purpose of giving notoriety to the deed . . . If the registration could at any time, at whatever distance of time, be opened, parties would never know what to rely upon, or when they would be safe. If the Registrar refuses to register there is at once a remedy by an appeal."

Applying that general statement of principle to the endorsement on a deed of the alleged authentication before the

Registrar of a power-of-attorney under which a person presenting the deed for registration purported to act I think, in the absence of either a finding or of evidence to the contrary, and there is a total absence of either in this case, we are entitled to assume that when the Registrar endorsed on the deed the due authentication in his office of the power-of-attorney meant that it was a power-of-attorney which had been properly executed and authenticated before him in accordance with law. And I therefore agree with my brother that the case of the respondents with regard to the presentation of 5th February breaks down. We therefore start with this that the document in question was presented at the Sub Registrar's Office for registration in accordance with the requirements of the law which, the Privy Council in a passage which I propose to cite had said "it is the duty of Courts of India to see carried out." The guiding principle recognized more than once by the Privy Council and reiterated by decisions in this Court is to be found in the head-note to the decision in *Mujibunnissa v. Abdur Rahim* (1).

"The power and jurisdiction of the Registrar only arises when he is invoked by a person in direct relation to the document."

And the necessity of guarding against opening the door even to trivial breaches of these requirements has been recently enforced by the judgment of their Lordships delivered by Sir John Edge in *Janbu Pershad v. Muhammad Nawab Aftab Ali* (2):

"It is the duty of Courts of India not to allow the imperative provisions of the Act to be defeated when as in this case, it is proved that an agent who presented a document for registration had not been duly authorized in the manner prescribed by the Act to present it."

I would only add that a perusal of the judgment of the High Court in that case delivered by Griffin, J., shows that there was positive evidence and a finding of fact negating the strict compliance with the requirements of the Act. These cases are decisions, as my brother has pointed out, under Ss. 32, 33 and 34 of the Act. And, as my brother has already pointed out there is in the provision about presentation in S. 75, to which I propose to refer in a moment, an absence of that imperative language which Sir

John Edge refers to in the passage I have quoted. This brings me to the question of the second presentation, namely, of 23rd July by the Collector through a letter after various incidents including the death of the mortgagee had occurred and a proceeding had taken place before the Registrar.

The receipt of that letter was carefully endorsed by the Sub-Registrar on the deed on the same day, and the second point which we have to decide—and it is really the great difficulty in the case—is whether there was a due presentation of that deed in accordance with S. 75. I have come to the conclusion that there was, very largely for this reason. I think Part 6 and Part 12 of the Act deal with totally different circumstances and contemplate a totally different situation, and that the fallacy underlying the respondent's argument is an attempt to introduce into Part 12 considerations bearing upon interpretation which are really only applicable to Part 6. The contrast between the two parts is really significant. Part 6 is a collection of sections, and they are those on which the decisions of High Courts and Privy Council have been mainly given, dealing solely with "of presenting documents for registration." Part 12 is also self-contained and deals with a situation created by what is called "of refusal to register," we have to deal with a case of refusal to register and of another kind of presentation in consequence of the proceedings rendered necessary by such refusal. S. 71 (2) says that

"no Registering Officer shall accept for registration a document endorsed with a refusal unless and until, under the provisions hereinafter contained, the document is directed to be registered."

• Section 72, so far as there is anything before us in the case at present, does not apply but I refer to it for one rather important fact. The word "presented" occurs in it, namely, that an appeal may be heard from the order of the Sub-Registrar if presented to the Registrar within 30 days. It could hardly be contended that that presentation must be of the strict personal character which is obviously intended by Part 6 of the Act and therefore we find in the part of the Act which we have to construe that the word "presented" is used in what I may call a more elastic sense. S. 73 deals with the right of the party who desires to secure registration where the Sub-Registrar refuses on

2. (1901) 23 All 283=28 I. A. 15 (P O).

3. A I R 1914 P O 16=28 I O 422=87 All 49=42 I A 22 (P O).

the ground of the denial of execution. That right is to apply to the Registrar to establish his right to have the document registered. S. 74 provides for an inquiry before the Registrar as the result of such application into (a) the execution, (b) the compliance with the requirements of the law. As regards "presenting" it clearly refers to such presentation as is dealt with by Part 6 "so as to entitle the document to registration." And in connexion with such inquiry S. 75 (4) enables the Registrar to summon and enforce the attendance of witnesses to compel them to give evidence as if he were a Civil Court and to deal with costs which are made recoverable as if they had been awarded in a suit under the Code of Civil Procedure. In my view that proceeding is a judicial proceeding and was intended by the legislature to be a judicial proceeding, the ordinary penalty for failure in which was visited on the unsuccessful party in the way such penalties are. And to my mind therefore the questions of the due execution, the due authorization of the person presenting, and the due presentation, when such an inquiry has taken place, are decided and disposed of for the purpose of the immediate question of registration or non-registration in a final order.

The result of the Registrar's order, if in the affirmative, is to establish the right of the person to have the document registered and to entitle the document to registration, and the form of his order is an order that it shall be registered. To my mind, though I feel difficulty and hesitation about it, it would be to attribute totally superfluous particularity to the legislature if one were to hold that these provisions in S. 75 superimpose upon that solemn proceeding and final decision a duty, upon the person who desires merely to carry out the order of the Registrar, of performing the strict formalities which are necessary and repeatedly held by the Privy Council to be necessary before the registration by the Registrar has taken place. To my mind what happens after the Registrar's order as provided by S. 75 is pure machinery. Any form of presentation, if it is backed up by an application which takes place on the part of the presenter and is noted on the order in his favour, is sufficient. And even if it were not, I agree with my brother that S. 87 covers the case. And if some other form of presentation is intended the

mistake is merely a defect in procedure. I therefore agree that this decision cannot stand and that the case is not covered by any of the authorities cited to us.

I want to add one word with regard to the way in which the case has been dealt with. As I have often said, it is in the interests of the Courts themselves, and what is far more important, in the interests of the litigants that in a case of this description, where the evidence has in fact been taken and both sides have done all that they are able or likely to be able to do before the trial Court, and the Court, when it sits down to review the whole case and write its judgment finds that there is some point which in its opinion enables it to dismiss the case, it should go on to dispose of all of the issues which have been dealt with in evidence and argued at the Bar before it. It is just as easy and there is no better time than when the hearing of the case is fresh in the recollection of the Court. Nobody is infallible and in a difficult case of this kind it is not unlikely that the appellate Court may take a different view of the law and therefore it is of the highest importance that the Courts with these points before them should go on to complete the whole case and come to a conclusion upon the merits.

The real question in this case is whether there is anything to show that these two infant children, whom the Court of Wards represents as plaintiffs, are to be deprived of the fruits of the contract entered into by their father. And here are we sitting in this Court with all the evidence material to that point already given on both sides in the Court below, and if findings had been arrived at by the Court below, fully equipped for disposing of the case upon the merits compelled to send the case back practically for a re-hearing, probably before another Judge, two years at least after the original hearing of the suit. It is suggested that even after that has taken place and it has come to this Court again, there might still be an appeal to the Privy Council on the main question of registration. All these proceedings have a tendency to prolong to an unspeakable extent the decision of a comparatively trivial dispute and to accumulate the expenditure of costs out of all proportion to the issues involved. Of course where there is a preliminary point, it is a totally different matter, viz., as to

whether a heavy appeal has been presented out of time. No doubt it is necessary to decide as a preliminary matter whether the Court is competent to hear it at all. When everything has been done to enable the trial Court to dispose of a case, I think it is a great misfortune, and it happens a great deal too often, that the Judge gets rid of it by disposing of some legal technicalities raised by one of the parties and leaving the merits wholly untouched. I agree with my brother that this is a preliminary point and that the proper order is the one that has been passed.

By the Court.—We set aside the decree of the Court below and remand the case to that Court under O. 41, R. 23, Civil P. C., for re-trial and disposal on the merits. We leave the costs of this appeal, which will include fees on the higher scale, to be costs in the cause.

V.B./R.K.

Case remanded.

* A. I. R. 1918 Allahabad 201

PIGGOTT AND WALSH, JJ.

Moti Chand and others—Appellants.

v.

Lalta Prasad and others—Respondents.

First Appeal No. 225 of 1915, Decided on 14th December 1917, from a decree of Third Addl. Sub Judge, Aligarh.

* (a) Evidence Act (1872), S. 68—Mortgage deed entering wrong rate of interest—Second deed executed incorporating some clauses of first deed—Suit on mortgage—One attesting witnesses of first deed dead—Second called but not examined—First deed could not be used in evidence—But as part of second deed it was admissible.

Defendants executed a mortgage in favour of plaintiffs, but it was discovered that the scribe had erroneously entered a lower rate of interest in the deed than was agreed upon between the parties. A fresh deed was thereupon drawn up and executed, which described the correct rate of interest and incorporated some clauses of the previous deed. In a suit on the mortgage it was found that one of the attesting witnesses of the first deed was dead. The second attesting witness was summoned but not examined:

Held: (1) that the first deed could not be used in evidence as an independent document either requiring attestation or in fact attested, inasmuch as the provisions of S. 68, had not been complied with;

[P 204 C 1]

(2) that the second deed having been duly attested and executed and having incorporated the prior deed, the prior deed was admissible in evidence as part of the second deed. [P 206 C 1,2]

(b) Evidence Act (1872), S. 68—"Called" means tendered for giving evidence.

The word "called" in S. 68, means tendered for the purpose of giving evidence. [P 202 C 2]

(c) Transfer of Property Act (1882), S. 59—Mortgage need not be in one document.

A mortgage need not be contained in one or any other particular number of documents. It may be collected from a variety of documents so long as the effective document is a duly signed, attested and registered instrument in accordance with S. 59, T. P. Act. [P 207 C 1]

Sunder Lal, Tej Bahadur Sapru and Radha Kanta Malaviya—for Appellants.

Motilal Nehru and Suredra Nath Sen—for Respondents.

Walsh, J.—The facts of this case are remarkably simple, though the questions which have been raised and discussed before us have covered a wide area. The plaintiffs, who brought this suit in the Court of the Third Additional Subordinate Judge of Aligarh to enforce a mortgage or rather, as they alleged, two mortgages dated respectively 15th May and 21st July 1909, carry on business as bankers and commission agents in the city of Benares. The defendants at or about the time carried on business as saltpetre merchants and were in the year 1909 obviously in considerable difficulties. Through the medium of an agent or general-attorney of the plaintiffs, one Beni Prasad Dube, it was arranged between the plaintiffs and one of the defendants, Sri Krishna Chand, that inasmuch as a considerable sum was already due from the defendants to the plaintiffs in respect of commission and other dealings which had taken place between them the plaintiffs instead of pressing for payment should render assistance to the defendants by treating the existing debt as a loan and taking security over their property. The present defendants were members of a joint Hindu family and carried on business together as such, Lalta Prasad being father and Sri Krishna Chand and Jhabhu Lal being the two sons. There was a good deal of delay in the completion of the necessary formalities to carry out the transaction, due apparently to some discussion with regard to the amount of the outstanding account between the defendants and the plaintiffs at that date.

This however, is not material because the amount of the debt was agreed and there is in fact no dispute as to the substantial effect of the transaction which was entered into. The whole difficulty that has been raised is one of form. A document was prepared by a pleader which was intended to be a mortgage, to carry out

the arrangement which had been agreed upon. It was written by a scribe of the name of Mukundi Lal and the plaintiffs' general attorney, Beni Prasad, according to his own account, with certain other persons who were to act as witnesses attended at one of the defendants' places of business in Farrukhabad. The father was absent. It is suggested that he was keeping out of the way on account of the pressure of his creditors. However that may be it is clear that he was not present on the occasion when the parties met with a view to executing the document, and it was signed only by the two sons above mentioned and by Sheobandhan Dube and Janki Das as attesting witnesses. It was also signed by his own hand by the scribe, in the sense that it contained a clause in his own handwriting stating that he had written the document on the 15th of May. And undoubtedly at one time it was suggested, and one of the grounds raised in the memorandum of appeal was that if there was any defect in the document by reason of the absence of sufficient attestation, that was cured by the clause containing the signature of the scribe. That argument, however was not seriously pressed; the scribe's evidence shows that he did not purport to attest and no further reference need be made to it. The document having been thus executed by the two sons whose signatures are said to have been attested by these two men Sheobandhan Dube and Janki Das it appears to have been originally intended to have the document registered in accordance with law as quickly as possible. But the plaintiffs, the mortgagees, required the signature of the father and the document was sent to him for signature and returned to the son, Sri Krishn Chand duly signed by the father on 31st May 1909, after a delay of some 13 or 14 days. What happened when the father affixed his signature does not appear. It is however quite clear that his signature was not attested by either of the attesting witnesses to the deed.

The document having been thus executed and registered and being at that time clearly regarded by everybody as a complete valid and properly executed mortgage-deed in accordance with the strict provisions of the law, was discovered to contain a slip by the scribe. The agreement had been for a rate of interest at eight annas per cent per mensem, but

only eight annas per cent. per annum was provided in the interest clause. It became necessary to correct this blunder and by consent of everybody a fresh deed was entered into on 21st July 1909 with this object. The terms and effect of that deed it will be necessary to consider with some care hereafter. It was duly signed by Lalta Prasad, the father and by both his sons in the presence of two attesting witnesses. It was duly attested by Janki Das one of the attesting witnesses to the former deed, and by Makundi Lal the scribe, and it was registered according to law on 16th November 1909. Default having been made the plaintiffs instituted this suit on 18th April 1914. Substantially there was very little contest about the merits. The main controversy turned upon the question of the attestation and the admissibility of the deed of 15th May 1909. One of the defendants Jhabbu Lal put in no appearance. The other two the father and one of the sons, admitting their signatures and denying that the amount entered in the deed was correct, alleged that the deed had not been duly executed and that the signatures had not been attested according to law. The first Court held that the document was inadmissible under S. 68, Evidence Act, for the following reasons.

At the trial it appeared that Sheobandhan Dube was dead. Janki Das was in Court. He was not called. The document was one which was required by law to be attested and no attesting witness, although one was alive, was called, as required by S. 68, Evidence Act. He had been summoned and was present in Court. The expression "called" used in the section clearly means tendered for the purpose of giving evidence. The learned Judge, therefore, had no alternative but to reject the document, and we agree with the course which took and with the reason which he gave for so doing. Very little attention, judging from the evidence and from the judgment, appears to have been paid to the supplementary or second deed of 21st July 1909. But relying on certain authorities which the learned Judge refers to in his judgment he gave effect to the deed of 15th May 1909, which he had rejected as inadmissible as a mortgage, as evidence of a covenant to pay, and passed a personal decree against all three defendants for the amount due. Thereupon an appeal was brought to this Court by

plaintiffs, challenging the decision upon three grounds: (1) That the execution of the deed had been proved. (2) That the evidence of the scribe who had in fact been called was sufficient as that of an attesting witness and (3) that the learned Judge had not properly weighed the evidence. There was a difficulty in serving the respondents with the notice of appeal. Ultimately substituted service was ordered by means of advertisement in the newspapers, and whether or not they had knowledge of the proceedings they did not in fact appear, although the order for substituted service was duly carried out at the hearing of the appeal, which was opened before my brother Piggot and myself on 29th March 1917.

During the discussion in the opening of the appeal it was pointed out amongst other things that there was some difficulty in appreciating the grounds upon which the learned Judge had given effect to the deed as a covenant to repay the money, while rejecting it as inadmissible under S. 68, and it was urged upon us with some force that if the failure of the suit resulted from the omission to call Janki Das during the trial, that was an omission which might, subject to certain penalties, be repaired without injustice to the defendants, if we were to afford an opportunity to the plaintiffs of producing him as a witness in this Court. We made an order on 29th March 1917 in the following terms:

"Without discussing further the question of law raised by this appeal, we think it sufficient to say that, under the circumstances, the appellants are entitled to an opportunity of producing before this Court for examination the witness Janki Das, who should perhaps have been produced by them in the Court below. Assuming that the appellants are prepared to deposit the necessary fees and expenses we order that this case be put upon any near convenient date, and summons to issue for the attendance of the said witness Janki Das, son of Kbiati Ram, caste Mahajan, resident of Muballa Mufti Sahab, in Farrukhabad, in this Court on such date."

Difficulties arose in carrying out that intention owing to the illness of Janki Das. Adjournments were applied for from time to time, which were granted in the hope that the whole thing might be settled by hearing the evidence of this witness, who might have been tendered in the Court below. Unfortunately the witness got worse and died and it was therefore impossible for the appellants to call him. The case therefore came on for re-

hearing before us in the condition in which it was, when it was originally opened before us in appeal with the addition which we had made by the order we passed on 29th March 1917. On this occasion the respondents put in an appearance and several questions have been argued in attack upon and in support of the decision of the Court below.

The real question which we have to decide is whether in fact the plaintiffs, in the events which have happened, have been able to establish by legal evidence the execution in their favour of a mortgage for this debt over the property of the defendants, and whether they are entitled to an order enforcing it in this suit. Now it is abundantly clear that the loan was made, that it was obtained by the defendants offering a substantial and valuable security, that the money is still due, and that the defendants have no merits of any kind. The case is an illustration of the pitfalls which the prudent provisions of the legislature made for the protection of ignorant and foolish persons may possess for the ordinary men of business and the use that knaves may make of them. There are, in evidence, some copy letters dated one of 19th May 1909 and two each of 1st June 1909. These, if genuine, are conclusive as to one material fact in dispute namely the attestation of the father's signature. Due notice to produce the originals of these was given to the plaintiffs through the Court on 25th January 1915. Bani Prasad, the general attorney of the plaintiffs, was cross-examined with a view to explaining the absence of the originals which were not forthcoming. He explained that after some short period it was the practice in the plaintiff's business to weed out and destroy letters, and the topic was pursued no further. Clear notice was given to the plaintiffs of the existence of these letters. They were called upon to produce them and the defendants were entitled to use their copies. We have examined the defendants' press copy letter book, in which these copies are contained. It is, relatively speaking, well kept and we are both satisfied that it is a genuine book.

These copy letters show three things. Firstly, that after being written out the day before, the document 15th May 1909 was signed by the two sons and attested by Sheobandhan Dube if not by

Janki Das, but that on 19th May the father had not signed it. Secondly that registration was delayed until after 31st May 1901 when the document was received back by Sri Krishen Chand from his father with the father's signature upon it, and that if the plaintiffs had not insisted upon the father's signature the defendants would have registered the document without it regarding the execution as then complete, and thirdly that the defendants were in need of money, that they were in profound misery, that their honour was in jeopardy and that they were anxious to do all they could to complete the security. What happened at the trial as to the failure to call the attesting witness has been clearly stated in the judgment of the first Court and has already been referred to above. The only living attesting witness was present in Court and was deliberately not called. This fact alone prevents the document by virtue of the provisions of S. 68, Evidence Act, from being "used as evidence," and if the plaintiffs' case rested upon the document of 15th May alone it must fail. We see no escape from this conclusion.

It was urged that the events which happened in this Court on 29th March 1917 and the death of the missing witness have removed this case from the operation of S. 68. We cannot agree with this view. We ordered that the plaintiffs appellants should be given an opportunity of producing the witness. It seems to us that that order had none of the attributes of finality. If was made an ex parte hearing. The respondents ought not to be allowed to improve their position by the fact of their absence. But it appeared to us that, apart from the debatable point as to whether the learned Judge ought, in the circumstances, to have given a decree for the principal money at all, it was possible that the omission of the plaintiffs in the first Court was a mere error of judgment which it was not too late to repair and that by allowing them to repair it justice might be done by penalizing by some order in respect of costs for their error. But it now appears perfectly clear that their act in refraining from calling Janki Das was due to their deliberate decision as to the conduct of their case.

The letters 19th May and 1st June 1909, though on the file, had not

been printed in this Court's book and had unfortunately been ignored in the judgment of the first Court and had not been considered relevant by the appellants in their presentation of the evidence. When we made the order of 29th March 1917, we had no notion of their existence. They now make it plain that the plaintiffs' general attorney endeavoured to prove the due attestation of the document of 15th May by the grossest perjury. He swore that the signatures of the father and the two sons were affixed in his presence and in that of Janki Das, Sheobandhan Dube and the scribe. "Jhabbu Lal," he said, "read the document and the other defendants (that includes the father, there can be no mistake about it) heard it."

The fact is that the father was not there. Further he said in cross examination:

"nobody signed the document on the day it was written. The signatures of the witnesses and the executants were affixed on the following day. Lalta Prasad was not present on the day the document was written. He came the next day, and the signature was affixed on the same day."

These statements are clearly deliberate falsehoods. Moreover, the evidence of Beni Prasad made an unfavourable impression upon the learned Subordinate Judge, who was not inclined to believe that Beni Prasad was present even when the document was signed by the sons, and in this conclusion he is very likely correct. Makundi Lal was even more specific both in examination-in-chief and in cross examination. He lied with elaborate and vivid detail and identified Janki Das as having attested all the three signatures on the same afternoon. He described in minute detail the process of execution and stated that Lalta Prasad affixed his signature first of all. What the condition of Janki Das's mind may have been it is idle to speculate, but he could not, if called, have stated, what the contemporaneous documents now show to have been the facts, without destroying the plaintiffs' case and casting discredit upon both their general attorney and the scribe. Had we known on 29th March the real state of the evidence on the record, it is unlikely that we should have granted any indulgence to the plaintiffs who had conducted their case with such materials. We think it was open to this Court at any time to hear further argument and finally to refuse to allow

additional evidence to be given. Our previous order, made by us under a misapprehension, cannot be used to enable the plaintiffs to avail themselves of S 69. We hold therefore that the document of 15th May cannot be used in evidence in the sense contemplated by S. 68, that is to say, as a mortgage which is required by law to be attested and has in fact been attested.

The three letters to which I have referred further show that the document was not in any case duly attested, one of the signatories having clearly signed it at another place and on some date subsequent to the attestation by the only witnesses who are alleged to have attested. It was urged with great force by Sir Sunder Lal on behalf of the appellants that it might be treated as a document duly signed, attested and executed by two members of a joint Hindu family dealing with joint family property and that the consent of the remaining member of the family, in this case the father, who alone could object, could be proved by any method known to the law. Speaking for myself I do not think it necessary to decide whether this contention is sought or not, because in either view the provisions of S. 68 not having been complied with, the document cannot be used as evidence at all as a document either requiring attestation or in fact attested. But this does not, in the events which have happened, prevent it from being used in evidence as something else or for any other purpose. It is obvious that S. 68 is subject to some limitation, e. g., if the document were tendered in some other proceeding for the purpose of proving the handwriting of the scribe, it could not seriously be objected to upon the ground that, no attesting witness being called to prove it, it could not be used in evidence at all.

The second deed of 21st July, as I have pointed out, was signed by all the parties to the transaction in this suit duly attested and duly registered. I treated the document of 15th May as a valid mortgage-deed and repeated some, at any rate, of its stipulations as being the terms which were to govern the new contract. We think it quite clear that we are entitled to look at the document of 15th May identified by reference, as it clearly is, in the document of 21st July in order to ascertain what these stipulations were. If they had

been contained in some other kind of document, clearly identified, to which the parties agreed that reference should be made for the purpose of interpreting their rights and obligations, such a document would clearly be made admissible by the act and contract of the parties, even though as an independent legal document it was itself inadmissible. It derives its admissibility from another source which binds the parties. This would apparently be so according to English law, under what is described in Taylor on Evidence as the sixth exception to the rule of inadmissibility due to the absence of an attesting witness, if the party objecting to it took some benefit from the latter document which treated the earlier one as valid. This is not the case here, the party objecting clearly undertook a greater burden. But I think in truth that it is not really an exception to the rule at all, but merely an illustration of a document to which the rule in England is inapplicable, and that the rule in India, that is to say, S. 68 is equally inapplicable in the present case for the purpose of deciding whether the earlier document is admissible as a document to which the parties have referred otherwise.

The case before us on this point bears a remarkable similarity to the case of *Fishmonger's Company v. Dimsdale* (1). In that case the decision of the Tindal, C.J., as reported in the statement of facts at p. 57 of the Law Journal Report, is precisely the objection now raised to the admissibility of the document of 15th May, but an exceptionally strong Court of the Exchequer Chamber overruled this objection and held that the document was admissible. The case occurred before the Common Law Procedure Act of 1864, and the rule of law which had to be dealt with, namely, with regard to the necessity of calling subscribing witness in order to render a document admissible at all, in substance did not differ from S. 68. Baron Parke in giving judgment gave as the reason that the memorandum endorsed, which corresponds in this case to the document of 21st July, incorporated the original argument. I prefer the judgment of Coleridge, J., as reported in the Law Journal Report, who added his own reason in these words. "There is a complete identification by words of reference." It is somewhat remarkable that

when a similar case arose at a later stage with reference to its admissibility having regard to the stamp, the Chief Justice was overruled for treating the earlier document as incorporated thereby, following the dictum of Parke, B. (vide 22 L. J. C. P.). But the principle is clear although the language in which it is expressed in the published report of the judgment may not be scientifically accurate. And we find it difficult to draw any distinction between that case and the case before us. We were referred to a further decision which is also very much in point. In 1885, the question arose as to the due registration of a deed of conveyance. There had been an earlier deed of 1873, which was not registered.

The transaction was sought to be carried out and put in force through a subsequent deed, namely of 1878, which, no doubt, did a little more than the document of 21st July does, actually re-affirmed and repeated in its entirety the deed of 1873, referring to it in express terms and setting it out in a schedule as part of itself, namely, the deed of 1878. When presented for registration, the memorandum of registration was written not on the first sheet but at the end of the deed which was annexed as a schedule to the deed of 1878. I take that statement from the judgment of Sir Barnes Peacock, and it would appear from that that the deed of 1873 had actually been copied out or itself annexed as a schedule to the subsequent deed of 1878. But there can be no difference in principle whether the document is incorporated by actual physical annexation, or by reference in unmistakable terms of identification. The High Court in that case had held that the registration was insufficient because the the latter document had not been registered and the endorsement upon the deed in the schedule, being upon a document which in itself could not be proved could not be looked at. The Privy Council overruled that contention in these words,

"that document (that is, referring to the earlier document) was not proved. It could not be proved because it could not be given in evidence. But the fact that the deed itself could not be given in evidence was no reason why the deed of 1878 should not be given in evidence and that deed (referring to the deed of 1873) was proved to have been executed and duly registered."

That language covers, in our view, in

almost express terms the point raised in this case, namely as to whether the document of 21st July having been duly executed and attested does not in sufficient terms refer to the earlier document which was inadmissible in itself, so as to make it admissible as part of the latter document. The question of interpretation remains. This of course is totally distinct from the question of admissibility. What is the effect of these two documents bearing in mind that we are not entitled to treat the document of 15th May as a mortgage at all or even as a documents in itself binding upon the parties for anything? On the whole we think that the document of 21st July 1909 hypothecates the property described in the specification for interest at eight annas per cent-per mensem on the sum of Rs. 32,914.3 9 from 15th May 1909. We also think although we feel some doubt about it, that it sufficiently hypothecates the property for the principal sum. It clearly repeats or incorporates the clauses in the deed of 15th May which relate to interest. It says:

"We shall pay interest on the debt due to the Babu Sahibs at 6 per cent per annum, which is equal to eight annas per cent per mensem, in accordance with the stipulation laid down in the aforesaid mortgage deed."

The document must at any rate therefore be construed as having contained within it, in express terms at least Cls. 1, 2 and 3 of the document of 15th May. Cl. 2 provides that if the interest is not paid within six months the executants shall be liable to pay compound interest at eight annas per cent per mensem and further that (after fulfilment of certain provisions which involve a reference to the body of the document to ascertain the meaning of the words "the above term").

"the said Babu Sahibs will be at liberty to recover the entire amount payable to them by taking proper proceedings from our person the perty mortgaged and other property, moveable as well as immovable belonging to us the executants."

The indebtedness for the principal is clearly acknowledged by the deed of 21st July, and we find it difficult to give effect to Cls. 1, 2 and 3 which are thus clearly incorporated and accepted in the document 21st July as governing the payment of interest together with the consequences for non-payment without also giving effect to those parts of them which

govern the payment of the principal. The two are indissolubly connected. The property mortgaged is clearly specified in the later document of 21st July: Cl. 2 can only mean that a power of sale is to be exercised by the Babu Sahibs for non-payment and Cl. 3 refers to realization which can only be read having regard to the provisions of Cl. 2 as meaning sale. The terms of S. 58 defining a mortgage are,

"a mortgage is the transfer of an interest in specific immovable property for the purpose of securing an existing debt."

"Where a mortgagor binds himself personally to pay the mortgage money and agrees expressly or impliedly that in the event of his failing to pay according to his contract the mortgagee shall have a right to cause the property to be sold and the proceeds of sale to be applied in payment of the mortgage money the transaction is called a simple mortgage."

We think that that is what all three executants impliedly did when they signed the document of 21st July. Their intention is obvious. The only doubt is as to whether they carried it out. It was unnecessary that they should repeat in express terms all that they had agreed to in the previous transaction, for both parties treated the previous deed as binding upon them; but it so happens that out of extra precaution they did repeat and reiterate those terms which we have mentioned and thereby impliedly gave the mortgagee a power to sell not only for the new rate of interest but for the principal. A mortgage need not be contained in one or any other particular number of documents. It may be collected from a variety of documents so long as the effective document is a duly signed, attested and registered instrument in accordance with S. 59, T. P. Act. We think that this is the real legal effect of the document which was duly executed and attested on the 21st of July and that, therefore, the plaintiffs are entitled to succeed in this suit upon that ground. It is not the ground upon which the case was first launched in the plaint, nor upon which the case was fought in the first Court, nor is it the ground upon which the plaintiffs by their memorandum of appeal sought relief in this Court, but, we think, it is the ground which gives effect to the real transaction between the parties, and which does substantial justice in spite of the mistakes the plaintiffs have made. The plaint and the memorandum of appeal

must be treated as having been duly amended for the purpose of raising the claim in this form based upon the subsequent document of the 21st of July 1909. But we do not think that the omission by the plaintiffs in the conduct of their suit ought to stand in the way of our doing what nobody can doubt is substantial justice in the case. On the other hand, we feel it impossible to pass by without marking our sense of the conduct of the plaintiffs in presenting their case to the Trial Court. As one would expect, no attempt has been made by their representatives in this Court to defend or justify it. We think that so far as that is concerned, the justice of the case will be met by altering the decree of the Court below and giving them a decree for sale of the mortgaged property without costs either of the suit or of this appeal.

Piggott, J.—I agree generally. The only difficulty I have felt is with reference to the principal of the mortgage-debt. I may put my point in this way: as regards the interest at six per cent. per annum it seems to me that, when the parties entered into the contract embodied in the agreement of July 21st, 1909, it was a definite part of the intention of the executants of that document to charge the extra rate of interest on the property, which they conceived to have been already mortgaged by the deed of the 15th of May. They may have done this only by way of extra precaution; but on the terms of the deed of July the 21st, 1909, even considered by itself alone, it seems to me that a hypothecation of the property specified at the foot for payment of interest therein covenanted for is made by necessary implication. If the intention of the parties had been otherwise, I do not believe there would have been any specification of the property in this deed at all. As regards the principal my difficulty is this, that the parties conceived themselves to have already effected a valid mortgage of the same property as security for the repayment of this principal, and it was presumably no part of their intention on the 21st of July 1909 to make a fresh hypothecation for that purpose. At the same time I agree with what has been said as to the anomaly of drawing any distinction between the effect of the transaction of July the 21st in respect of the principal and its effect as regards the

interest. Broadly speaking, what the law requires is a registered instrument, duly executed and attested, in order to effect a mortgage; we have such an instrument before us in the so called agreement of July the 21st, 1909. I think that we are entitled to read it in connection with the earlier document to which it refers, and that the results stated in the judgment of my learned colleague necessarily follow.

By the Court.—We allow this appeal and direct that in lieu of the simple money decree passed by the Court below a decree for sale be drawn up in the proper form in respect of the property specified in the plaint. Interest must be calculated at the rate of six per cent. per annum on the amount claimed up to the date fixed for payment, which we hereby fix at six months from this date. The decree will embody the usual provisions as to the consequences of payment or non-payment on the part of the judgment debtors, and the same decree will carry future interest at six per cent. per annum from the date fixed for payment until realization. For reasons which we have already stated we leave the parties to bear their own costs in both Courts.

V.B./R.K.

Appeal allowed.

A. I. R. 1918 Allahabad 208

RICHARDS, C. J. AND TUDBALL, J.

Pule Bishunath Rai — Defendant—Applicant.

v.

Bramhanand Swami—Plaintiff—Opposite Party.

Civil Revn. No. 51 of 1918, Decided on 24th July 1918, from order of Additional Subordinate Judge, Benares, D/- 29th November 1917.

Civil P. C (1908), Ss. 151 and 152—Decree as drawn up quite incorrect and unjust—Refusal to amend decree amounts to refusal to exercise jurisdiction vested in Court.

Plaintiff mortgages brought a suit on his mortgage and obtained a decree. From the judgment it appeared that the Court intended that the property should be sold for the amount of the plaintiff's mortgage, interest and costs but finding that the plaintiff had made a sub-mortgage, it directed that the sub-mortgagee should get the amount of her mortgage out of the proceeds of the sale before the plaintiff was paid. But the decree as drawn up directed the property to be sold not only for the amount of the plaintiff's mortgage but also for the amount of the sub-mortgage, that is to say, that the defendant was made liable not only for the mortgage which he had created but also for the sub-mortgage

which the mortgagee had created. The defendant therefore applied for amendment of the decree in order to bring it into accordance with the judgment, but the Court dismissed the application.

Held : that the decree as drawn up was quite incorrect and unjust and that the refusal of the Court to amend the decree amounted to a refusal to exercise jurisdiction vested in the Court, and that the High Court was therefore entitled to interfere in revision. [P 208 C 2]

Gokul Prasad for *Bhagwati Shankar*—for Applicant.

Radha Kant Malviya—for Opposite Party.

Judgment.—This application in revision arises under the following circumstances : A suit was brought to realize the amount of a mortgage. It appears that the plaintiff had made a sub-mortgage. The Court decreed the plaintiff's claim. Reading the judgment it is absolutely clear that the Court intended that the property should be sold for the amount of the plaintiff's mortgage, interest and costs; but finding that the plaintiff had made a sub-mortgage it directed that the sub-mortgagee should get the amount for her mortgage out of the proceeds of the sale before the plaintiff was paid. There seems to be very little doubt that the decree as drawn up directed the property to be sold not only for the amount of the plaintiff's mortgage but also for the amount of the sub-mortgage; that is to say the defendant and the defendant's property was being made liable not only for the mortgage which the defendant had made but also the sub-mortgage which the plaintiff had made. Nothing could possibly be more unjust and unequitable and it is impossible to read the judgment as having any such meaning. An application was made by the defendant to bring the decree into accordance with the judgment, pointing out this and another alleged error as to interest. We may point out that there had been an actual report made by the office of the Court, that the amount of the sub-mortgage had been added to the amount of the plaintiff's mortgage in the decree by mistake. The only order which the Court below has made is to state that an amendment is "uncalled for."

We think that under the special circumstances of this case this amounted to a refusal to exercise a jurisdiction vested in the Court. We allow the application and direct the lower Court to take up the application of the defendant for

amendment of the decree and to proceed to deal with it according to law, paying due regard to what we have stated above. We have mentioned that there was another allegation about interest, that the decree was not in accordance with the judgment in respect of interest also. We have not gone into this matter, but the lower Court will do so when the case goes back. The lower Court must take up the judgment and the decree and see whether the latter is in accordance with the former. The applicant will have his costs, including in this Court fees on the higher scale.

V.B./R.K. *Application allowed.*

A. I. R. 1918 Allahabad 209 (1)

BANERJEE, J.

Chandan Singh and others — Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 668 of 1917, Decided on 1st October 1917, from order of Sess. Judge, Aligarh, D/- 23rd July 1917.

Penal Code (45 of 1860), Ss. 304 and 325—Murder not common intention—Doubt as to who dealt fatal blow—Accused punishable under S. 325 and not S. 304.

Where in a fight several accused attacked the deceased with lathis and killed him and it was proved that the common intention of the accused was not to cause death or such injury as was likely to cause death but only to cause grievous hurt, and the evidence left a doubt as to which of the accused struck the fatal blow.

Held: that the accused were guilty of an offence under S. 325 and not under S. 304 of the Code. [P 209 C 2]

L. M. Banerji—for the Crown.

Judgment.—The appellants have been convicted of having caused the death of one Girdhar Singh and each of them has been sentenced, under S. 304, I. P. C., to ten year's rigorous imprisonment. It has been fully proved that there are various factions among the residents of the village of which the deceased was and the appellants are residents and that considerable enmity existed between the deceased and the appellants. A few days before the occurrence the deceased had given evidence against the appellants, and on the day on which he was killed he was to have given evidence against them in the Tahsildar's Court in favour of one of his partisans. That morning while he was seated at his chaupal the three accused came there, armed with lathis, and challenged the deceased Girdhar Singh.

1918 A/27 & 28

There was an exchange of abuse and each side threatened to strike the other. Some of the persons who were there intervened and one of them asked Girdhar Singh to go into his house and pushed him towards the door. When he had moved a few paces the three accused attacked him with their lathis, knocked him down and inflicted injuries. The medical evidence shows that his skull was extensively fractured and this resulted in his death which took place the same evening. The above facts are fully proved by the witnesses for the prosecution, who have been believed by the learned Sessions Judge and whom there is no reason to disbelieve. Their evidence however does not show which of the three accused struck the fatal blow which caused the fracture of the skull. With the exception of Hublal, who only says that Tota accused struck the deceased on the head, the others are unable to say anything on the point. Hublal is the brother of the deceased and it is probable that he was exaggerating. The evidence leaves it in doubt which of the assailants of Girdhar Singh struck the blow which proved fatal. Under these circumstances the appellants cannot be convicted under S. 304. The common intention of the accused was not to cause death or such injury as was likely to cause death but only to cause grievous hurt. This case is similar to that of *Emperor v. Bhola Singh* (1) in which it was held, under circumstances which were exactly the same as those of the present case, that the accused were guilty under S. 325 and not under S. 304. I therefore alter the conviction to one under S. 325, I. P. C., and reduce the sentence, in the case of each appellant, to one of five years' rigorous imprisonment.

V.B./R.K.

Conviction altered.

1. (1907) 29 All 282=5 Cr. L. J. 180.

A. I. R. 1918 Allahabad 209 (2)

RICHARDS, C. J. AND BANERJI, J.

Sheo Prasad Singh—Judgment-debtor—Appellant.

v.

Mr. Premma Kuar—Decree-holder—Respondent.

First Appeal No. 77 of 1917, Decided on 30th November 1917, from order of Dist. Judge, Gwazipur, D/- 30th March 1917.

Civil P. C. (5 of 1908), S. 104 (2), O. 21, R. 90—No second appeal lies against order refusing to set aside sale.

Where an application to set aside a sale under O. 21, R. 90 is refused under R. 92 of the order an appeal lies under O. 43, R. 1 (j) but no second appeal is allowed from the order passed by the appellate Court. [P 210 C 1]

Uma Shankar Bajpai—for Appellant.

Kamla Kanta Verma—for Respondent.

Judgment.—A preliminary objection has been taken to the hearing of this appeal on the ground that an appeal does not lie. The facts are these: The property of the appellant, who was judgment-debtor to a decree, was sold by auction. He made an application under O. 21, R. 90, to have the sale set aside on the ground of irregularity and fraud in the publication and conduct of the sale. His application was allowed by the Court of first instance but on appeal to the lower appellate Court that Court allowed the appeal and dismissed the application. From the order of the appellate Court the present appeal has been filed. S. 104, Civil P. C., sub-S. (2), provides that no appeal shall lie from any order passed in appeal under the section. Cl. (1), sub-S. (1) provides that an appeal shall lie from an order made under rules from which an appeal is expressly allowed by the rules. O. 43, R. (1) Cl. (j), expressly provides an appeal from an order under R. 92, O. 21. That rule refers to an order confirming or setting aside a sale. The order passed in this case was an order refusing to set aside a sale. Therefore an appeal lay to the Court below under O. 43, R. 1, Cl. (g), but having regard to the provisions of S. 104 (sub-S. 2) no further appeal from the order of the appellate Court lies to this Court. The present appeal is consequently not maintainable. The learned vakil for the appellant refers to cases under the old Civil Procedure Code, in which it was held that an order made upon an application to set aside a sale on the ground of fraud was an order under S. 244 of the Code and therefore a second appeal lay. But the present Code has made an important alteration in this respect and it provides in O. 21, R. 90 that an application may be made to set aside sale on the ground amongst others, of fraud in the publication and conduct of the sale. Under the present Code therefore an application may be made on the ground of fraud and if this

application is refused under R. 92, an appeal lies under O. 43, R. 1, and Cl. (j) but no second appeal is allowed from the order passed by the appellate Court. We accordingly allow the preliminary objection and dismiss the appeal with costs.

V.B./R.K.

Appeal dismissed.

A. I. R. 1918 Allahabad 210

PIGGOTT, J.

Ram Nath—Plaintiff—Applicant.

v.

Sekhdar Singh—Defendant—Opposite Party.

Civil Revn. No. 46 of 1917, Decided on 2nd July 1917, from order of Small Cause Court. Judge, Fatehpur.

Provincial Small Causes Courts Act (1887), Art. 8—Suit against partner in tenancy for recovery of share of rent is cognizable by Court of Small Causes.

Defendant, in consideration of being admitted as a partner in the plaintiff's tenancy, agreed to pay to the latter a certain sum as his estimated share of the rent of the holding:

Held: that the payment was not rent within the meaning of Art. 8, so that a suit for its recovery was cognizable by a Court of Small Causes. [P 210 C 2]

J. N. Mukerji—for Applicant.

Bhagwati Shankar—for Opposite Party.

Judgment.—This was a suit for money in a Court of Small Causes. That Court has refused to entertain it on the ground that it is not cognizable by that Court, being a suit for rent. It presumably refers to para (8), Sch. 2, Provincial Small Causes Courts Act, 9 of 1887. If it were a suit for rent at all it, would be cognizable by a Revenue Court under the provisions of the Tenancy Act, and the Revenue Court has already refused to entertain a claim for this money, though the defendant is not to blame for this. On the plaint as drafted the claim is for damages for breach of a contract. I set aside the order of the Court below and direct the Court to re-admit the suit on to its file of pending cases and to dispose of it according to law. Costs here and hitherto will abide the event.

V.B./R.K.

Application allowed.

A. I. R. 1918 Allahabad 211 (1)

KNOX, J.

Bakhtawar—Applicant.

v.

Emperor—Opposite Party.

Criminal Ref. No. 14 of 1918, Decided on 8th January 1918, made by Sess. Judge, Cawnpore, D/- 10th December 1917.

Workmen's Breach of Contract Act (1859), S. 2—Smallness of advance is not justification for refusal to perform contract.

The smallness of the advance is not a reasonable excuse for refusing to perform the contract within the meaning of S. 2. When a man enters into a contract, he must carry out the terms of the contract into which he has entered unless he can show some reasonable excuse. One of the terms of the very same contract can hardly be afterwards held up as a reasonable excuse for non-performance." [P 211 C 2]

Judgment.—The learned Sessions Judge of Cawnpore has reported this case for orders. The case is thus stated by him: One Bakhtawar, a workman already in the service of a master, whose name is not given, took an advance of Rs. 10 and promised to work for 10 months on the understanding that Re. 1 was to be deducted each month from his wages. He worked for a very small portion of the time and then refused to go on working. The Joint Magistrate of Cawnpore directed him to perform the contract on a bond of Rs. 50 with one surety in Rs. 50 or in default to undergo two weeks' rigorous imprisonment. The learned Sessions Judge considers it absurd to allow an employer to tie down a servant to work with him for 10 months on a mere advance of a sum amounting to Re. 1 for each month of the service. But he apparently feels that the language of the Act is too strong for his view, unless it can be held that there is some lawful or reasonable excuse for refusing to perform the contract. In his referring order he says that Bakhtawar, so he is told, is perfectly willing to pay back the Rs. 10 and considers that an offer on Bakhtawar's part to pay back the Rs. 10 would constitute a reasonable excuse for refusing performance of the contract. Further the learned Judge says that it is not clear whether there was any evidence of such an offer by the appellant as the record is summary, and suggests that the High Court will be prepared to hold that any excuse is a reasonable excuse under S. 2, Act 13 of 1859 for not performing an unreasonable contract. Ap-

parently the case of *C. J. Lucas v. Ramai Singh* (1) was never brought to the notice of the learned Judge. The difficulties which occurred to the learned Judge were put forward in that case and considered. That was a Division Bench case and I am bound by the ruling. Over and above that I am not prepared to hold that such a contract is unreasonable or absurd; the more so when the contract is made and breach of it occurs in a town like Cawnpore where, unless it is proved to the contrary, every workman knows that there is a law like Act 13 of 1859 and enters into a contract voluntarily and willingly. When a man enters into a contract, he must carry out the terms of the contract into which he has entered unless he can show some reasonable excuse. One of the terms of the very same contract can hardly be afterwards held up as a reasonable excuse for non-performance. Let the record be returned with this expression of opinion from this Court.

V.B./R.K.

Record returned.

1. A I R 1914 All 108=23 I C 185=15 Cr L J 293.

A. I. R. 1918 Allahabad 211 (2)

PIGGOTT AND WALSH, JJ.

Mt. Salamat-uz zamani Begam — Defendant—Appellant.

v.

Masha Allah Khan and others—Plaintiffs—Respondents.

Second Appeal No. 442 of 1916 Decided on 20th November 1917.

(a) **Contract—Liability—Agreement acted upon — Equity will support transaction although imperfect.**

Equity will support a transaction though clothed imperfectly in those legal forms to which finality attaches after the bargain has been acted upon. [P 213 C 1]

(b) **Transfer of Property Act (4 of 1882), Ss. 54 and 118. S selling certain land to M by registered deed—M. transferring on same day a shop to S. by registered deed—Subsequent agreement between S. and M. to re-transfer properties, thus each remaining in possession of what was originally transferred by deed — Subsequent transaction held binding on parties in spite of non compliance with Ss. 54 and 118.**

S. by a duly registered sale-deed sold and transferred to M, inter alia, the land in dispute. M on the same day by another duly registered sale-deed sold and transferred to S, inter alia, a certain shop. Shortly after this M. and S agreed to re-transfer or to exchange the two properties which each had thus purchased from the other, and each remained in possession of what had originally been transferred by the deeds. M's

heirs sold the shop after *M's* death to *M's* widow in lieu of dower and thereafter sued *S* for the land in dispute.

Held: that the transaction had become effectually binding upon the parties in spite of the fact that the provisions of Ss. 54 and 118, had not been complied with. [P 213 C 1]

(c) **Transfer of Property Act (1882), S. 54—S. 54 does not prohibit vesting of title to property unless effected by formal transfer.**

Per *Walsh, J.*—Section 54, is not inconsistent with the principle laid down in *A. I. R. 1914 P. C. 27 (P. C.)*, and it does not prohibit the vesting of title to or interest in property unless effected by a formal transfer. [P 213 C 2; P 214 C 1]

Per *Piggott, J.*—Where the Statute requires that a particular kind of transfer shall be effected by a particular kind of instrument, the Privy Council has enforced such a provision with great stringency and cannot be said to have ruled in *A. I. R. 1914 P. C. 27 (P. C.)*, that there can be a valid transfer of property by way of exchange without registration of the deed under such circumstances as obtain in this case.

[P 215 C 1]

Iqbal Ahmad—for Appellant.

Sulaiman—for Respondents.

Walsh, J.—The facts of this case as found in both Courts are simple, but the question of law is one of some importance. By a duly registered sale-deed, the defendant Mt. Salamat-uz-zamani, about 4th August 1905, sold and transferred to one Muhammad Ali Jan Khan (inter alia) the 2½ biswansis of land now in suit. On the same day Muhammad Ali Jan Khan, by another duly registered sale deed, sold and transferred to Mt. Salamat-uz-zamani (inter alia) a certain shop in Bulandshahr. The value of the shop on the said date has been found to have been Rs. 125, and the value of the land now in suit has been found to have been Rs. 100. Shortly after these two sale-deeds, Muhammad Ali Jan Khan and the defendant verbally agreed to re-transfer or to exchange these two properties which each had thus purchased from the other, and each remained in possession of what had originally been transferred by the deeds. Neither purchaser had any property in the district in which the property originally transferred to him by his deed was situate, and although it is not found and therefore is not material to any point we have to decide, it is probable that the original inclusion of the two properties in the deeds of sale was only with the object of defeating, or technically complying with, the Registration law. From the date of the agreement to re-transfer or exchange, the two remained in possession of their

original properties, and treated them as their own. Muhammad Ali Jan Khan was a Mukhtar. He obtained mutation of the other properties purchased by him from the lady, but not of the land now in suit. He died about five years afterwards, and at the date of his death the shop which he had agreed to take back in exchange, being still in his possession, was treated as part of his inheritance, and in February 1911 was sold by his heirs to his widow with the rest of his property in lieu of dower.

In fact everything was done as regards the property in suit, and the shop which it was agreed to exchange for it, as though the exchange had been formally carried out, as it ought to have been, by a registered instrument under Ss. 118 and 54, T. P. Act (4 of 1882), except that there was no writing of any kind on either side. The plaintiffs, who are some of the heirs of Muhammad Ali Jan Khan, and who sue in that capacity, now claim the land originally sold and transferred to him by the said deed. Both Courts below are in agreement as to the facts above stated. The first Court dismissed the suit. The lower appellate Court reversed this decision upon the ground that the exchange was "not valid," or in other words, that there was no transfer by a registered instrument and no delivery of possession. The question which we have to decide is whether under the general principles of law in this country a transaction of this kind, so acted upon by the parties, has become effectually binding upon them, in spite of the fact that the provisions of Ss. 54 and 118 have not been complied with.

This question turns upon the further question whether the dicta of the Privy Council in *Mahmed Musa v. Aghore Kumar* (1) apply to this case and other similar cases. In England, if the question arose under the analogous case of Statute of Frauds, and the contention was that no interest in the land had passed because the contract not being in writing did not comply with the provisions of the Statute, the plaintiffs position would be quite untenable. As to this the law has been well settled since *Maddison v. Alderson* (2), where Lord Selborne with the concurrence of the

1. A I R 1914 P C 27=42 Cal 801=42 I A 1=23 I C 930 (P C).

2. (1833) 8 A C 467.

other members of their Lordship's House said that in a suit founded on performance, or part performance, the defendant (in this case the plaintiff) is

"really 'charged' upon the equities resulting from the acts done in execution of the contract, and not (within the meaning of the Statute of Frauds) upon the contract itself. If such equities were excluded, injustice of a kind which the Statute cannot be thought to have had in contemplation would follow."

The case in the Privy Council above mentioned arose out of some mortgage transactions of 1848 and 1871 respectively. Differences arose between the parties. A suit was brought and a compromise was reached by which the mortgage debts were to be paid off and the properties were to be legally conveyed by the mortgagor to the parties entitled to them in certain shares. A decree was made that the suit was decided in terms of the compromise and struck off. No conveyances were executed in completion of the contract of compromise, nor was the compromise registered. But it was acted upon by the parties for a period of from thirty to forty years. The Privy Council held that though the compromise and decree taken together might be considered defective or inchoate as a validly concluded agreement, the acts of the parties had been such as to supply all defects. It was strongly contended that the document of compromise being unregistered was inadmissible, that oral evidence was inadmissible, that there had been no transfers and that the acts of the parties conferred no title. In the judgment of their Lordships, delivered by Lord Lhew, it was pointed out that at that date no written conveyance was required by the law of India, and that the Transfer of Property Act, 1882, did not apply. But

"in view of the argument strongly pressed upon them their Lordships think it right to say"

that "the Laws of India and of England follow the same rule," and following the principle of *Maddison v. Alderson* (2) (supra);

"equity will support a transaction clothed imperfectly in those legal forms to which finality attached after the bargain has been acted upon."

In my opinion this is an authoritative statement of the law binding upon the Courts in India, and applicable to the case, as the facts have been found, now before us. Its binding effect can only be questioned in so far as it can be shown that there is some express statutory enact-

ment inconsistent with it and not present to their Lordships' mind. In my opinion S 54 is not inconsistent with it, and moreover it must have been present to their Lordships' mind. The defendant in this case is not relying upon a document of transfer, but upon the complete performance of a contract for sale or exchange. Of the most recent authorities in the country, in which this question of principle has arisen, there are some in which the view of the Privy Council has clearly been acted upon and there are none which suggest any special feature of the law of India which would appear likely to have affected their Lordships' opinion, if their attention had been drawn to it. In *Sumsuddin v. Abdul Husein* (3) Jenkins, C. J., said that the chance of an heir-apparent succeeding was not transferable and that it could only be bound, if at all, by the application of the principles of equity, and that they could not be applied because the property in question belonged to a category the transfer of which was prohibited altogether.

In *Karalia Nanubhai v. Mansukhram* (4) Jenkins, C. J., had given effect to the principle by holding that a judgment-debtor, who had sold certain land and delivered possession thereof and been paid the purchase-money, had no attachable interest, although there had been no transfer by him within the meaning of S. 54. It follows logically from this decision that if he had lost all interest in the land, his purchaser must have acquired it all, though there was no transfer. This case and the case of *Ram Bakhsh v. Mughlani Khanam* (5) to which reference will be made hereafter, were definitely said not to be good law in the Madras Presidency by the Court which decided *Chidambara Chettiar v. Vaidilinga Padaychi* (6), following the so-called Full Bench decision in Madras in *Kurriveerareddi v. Kurri Bapireddi* (7). This latter decision was the authority most relied upon by the respondent in the present appeal. It would therefore appear that there is a conflict of opinion, upon the application of the principles above stated to cases in India, between the Madras and the Allahabad deci-

3. (1907) 31 Bom 165

4. (1900) 24 Bom 400.

5. (1904) 26 All 266.

6. (1915) 38 Mad 519=30 I O 403.

7. (1906) 29 Mad 336 (F B).

sions, and the question really arises whether the more recent pronouncement of the Privy Council has solved this doubt.

The Madras case was decided by the Chief Justice and two Judges. The Chief Justice evidently entertained considerable doubt. In that case there was an agreement for sale, followed by delivery of possession to the purchaser and payment of the price. It was held that S. 54 was imperative and unless complied with equity could not uphold the transaction. The Chief Justice referred to the considerations of public policy, namely the intention of the legislature to minimise the chances of litigation, and the opportunities for perjury. These are equally applicable, if relevant, to the English Statute of Frauds. It is not easy to follow the distinction drawn by the learned Chief Justice between the English and the Indian law. He takes the view that the Courts in India are under no obligation to engraft the English decisions upon the Transfer of Property Act, and discusses the principles of the interpretation of Statutes. But the question is not one of the interpretation of the Statute.

There is admittedly no "transfer" within the meaning of the section. But the section does not prohibit the vesting of title to or interest in property unless effected by a formal transfer. The cases which have dealt with the matter upon the principle that there can be no estoppel in the case of a statutory prohibition are not open to the same criticism, as the case of the defendant before us does not rest upon the doctrine of estoppel as applied to an admittedly invalid transfer. The learned Chief Justice points out that at that date (1904) the Indian authorities were in conflict, and it is not therefore profitable to examine them in detail. There are however four cases in which the principle now contended for on behalf of the appellant has been applied by this High Court; *Begam v. Muhammad Yakub* (8) by a Bench of six Judges (of whom one dissented), vide the judgment of Edge, C. J., on p. 350; *Ram Baksh v. Mughlani Khanam* (5), in which it was held that S. 54 did not apply, *Muhammad Talib Husain v. Inayat Jan* (9) in which the section was not referred to, and the recent case of *Jhamphu v. Kutramani* (10)

decided by my brother Tudball and myself. In the latter case there has been a relinquishment by the acts of the parties, which had originally been attempted to be carried out by an unregistered document, and adverse possession for the statutory period. The question was whether the unregistered document was admissible to explain the possession. The same point had been taken in the Privy Council in *Mahomed Musa v. Aghore Kumar* (1). Admittedly there had been no transfer, but we held that the document was admissible, and that the evidence supported the title of the party in whose favour the informal relinquishment had been made and the Statute of Limitation had run. I adhere to the view I then expressed that the judgment of the Privy Council as to the law in India was decisive upon the point. Although it is not customary to refer to the works of living authors, I observe that in discussing this question, Dr. Gour, in Edn. 4, of the "Law of Transfer," Vol. 1, p. 602, takes the other view, referring to *Karalia Nanubhai v. Mansukhram* (4) and *Ram Baksh v. Mughlani Khanam* (5) says

"that these cases are founded on no intelligible principle, and if accepted, would have the effect of overriding the clear provisions of the law."

This is rather severe on the Privy Council, and is supported in the main by reliance upon the Madras cases cited above. However in the addenda to Vol. 3 contained in the reprint which brings the citation of cases upto 1916, he refers to his notes abovementioned and says, "but see *Mahomed Musa v. Aghore Kumar* (1) indicating that in his view the Privy Council has in that case decided otherwise. From all these authorities it appears that there is nothing inconsistent in India with the rule of law in England on this matter, unless it be S. 54, T. P. Act, and that this difficulty has been removed by the dicta of the Privy Council which are in my opinion, binding upon us. The question of limitation was not raised in the case in the Privy Council, and is not raised in the suit now under appeal. It is clear however from the judgment delivered by Lord Shaw that he was dealing with the period which had elapsed only as one of the details of the history, and not as a matter of principle. In my opinion *Mahomed Musa v. Aghore Kumar* (1) in effect overrules *Kurriveerareddi*

8. (1894) 16 All 344 (F B).

9. (1911) 33 All 633=11 I C 762.

10. (1917) 42 I C 713.

v. *Kurri Bapireddi* (7) and is decisive of this appeal.

Piggott, J.—I concur in the proposed order. I feel it incumbent on me to say that I am unable to apply the dicta of their Lordships of the Privy Council in *Mahomed Musa v. Aghore Kumar* (1) to the facts of the present case, so as to hold that there has been a valid transfer of the property in suit by way of Exchange. Their Lordships were dealing with a suit to redeem a mortgage, and they held that the mortgage had long before been extinguished by act of parties. It is nowhere laid down in the Transfer of Property Act (1882) that redemption of a mortgage can be effected only by a registered instrument. Where the Statute requires that a particular kind of transfer (as for instance a mortgage) shall be effected by a particular kind of instrument, it seems to me that their Lordships have always enforced such a provision with great stringency, as for instance in the importance attached to the word "attested" in S. 59, T. P. Act. I think therefore that on the facts as found I must regard the plaintiffs as being in law the owner of the property in suit. It does not follow that they are entitled to present possession as against the defendants, who are obviously not mere trespassers. There has been a contract of exchange, partly executed by what must be regarded as equivalent to mutual delivery of possession; all that was required for complete execution of the contract was a registered instrument. There is no reason why the law should not hold the parties bound by the contract so far as it was carried into effect and by the equities arising out of their own acts. The contract between the parties clearly involved this agreement, that the defendants should not be disturbed in their possession of the Jafarabad property so long as Muhammad Ali Jan Khan or his successors retained the Bulandshahr shop, dealt with it as their own and did not make it over to the defendants. I do not think the plaintiffs are by law estopped from calling themselves the owners of the Jafarabad property; but I think they are bound, under the circumstances, by an agreement, which the Court will recognize and enforce, not to eject the defendants from the same. The case for the present defendant is stronger than that which found favour with a Bench of this Court in

Ram Bakhsh v. Mughlani Khanam (5). I agree therefore that the decree of the lower appellate Court must be set aside and that of the Court of first instance restored. The plaintiffs will pay all costs throughout, including in this court-fees on the higher scale.

By the Court.—The order of the Court is that this appeal is allowed, the decree of the lower appellate Court is set aside and that of the Court of first instance is restored. The plaintiff will pay all costs throughout, including in this court-fees on the higher scale.

V.B./R.K.

Appeal allowed.

A. I. R. 1918 Allahabad 215

BANERJI, J.

Ram Kishan—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 674 of 1917, Decided on 26th September, 1917, from order of Offg. Dist. Magistrate, Bareilly, D/- 23rd July 1917.

Criminal P. C. (1898), Ss. 110 and 123—S. 123 does not apply when security is furnished.

Section 123 has reference to a case where default is made in furnishing the security required but if the security is given the section does not apply and no reference to the Court of Session is necessary. [P 216 C 1]

C. J. A. Hoskins—for Applicant.

S. P. Ghosh—for the Crown.

Judgment.—*Ram Kishan* was called upon under S. 110, Criminal P. C., to furnish security for good behaviour on the ground that he was a man of a dangerous and desperate character. The Officiating District Magistrate of Bareilly, who tried the case, made an order under S. 118 directing *Ram Kishan* to furnish security to be of good behaviour for two years. As the security was furnished, he did not submit the case to the Sessions Judge under S. 123 of the Code. The first plea taken in the application for revision to this Court is that the learned Magistrate acted contrary to law in not complying with the provisions of S. 123, sub-S. (3), and not sending the record for the orders of the Sessions Judge. Having regard to the clear language of S. 123, which is to the effect that if a person who has been ordered to furnish security does not give such security the Court may direct him to be detained in prison pending the orders of the Sessions Judge, the learned counsel for the applicant did not press

the plea. In the case of *Rai Isri Pershad v Queen Empress* (1) it was observed that the section has reference to a case where default is made in furnishing the security required, and that if security is given, the section does not apply and no reference to the Court of Session is necessary. Security having been furnished in this case, it was not necessary to submit the case to the Sessions Judge. As the order in the present case was made by the Officiating District Magistrate, I have allowed the whole of the evidence to be laid before me by the learned counsel for the applicant. In view of that evidence which shows that there are specific instances in which the accused had been maltreating people, trying to extort money and had been extorting money, it cannot be held that he has retrieved his character. He had already been convicted six times and it is not satisfactorily shown that since his last conviction in 1914 he has improved his character. On the contrary the evidence goes to prove that he is still pursuing his old habits. Under these circumstances I do not feel that I should be justified in interfering with the order of the Court below. I accordingly dismiss the application.

V B /R.K. *Application dismissed.*

1. (1896) 23 Cal. 621.

A. I. R. 1918 Allahabad 216 (1)

KNOX, J.

Dooba Tewari and others—Accused—Applicants.

v.

Emperor—Opposite Party.

Criminal Revn. No. 190 of 1918, Decided on 3rd May 1918, from order of Dist. Magistrate, Basti.

Criminal P. C. (1898), S. 106—District Magistrate not as appellate Court but while considering question of enhancement of sentence has no jurisdiction to pass order under S. 106.

A District Magistrate, while considering an application for enhancement of sentence and not trying the case as a Court of appeal, has no jurisdiction to order the accused to furnish security under S. 106. [P 216 C 2]

Satya Chandra Mukerji—for Applicants.

R. Malcomson—for the Crown.

Facts.—Appeal from the following order of the District Magistrate, dated 5th February 1918: "The application to have the punishment awarded enhanced is dismissed. The Court has no jurisdiction to enhance and the case is certainly

not one for sending to the higher Courts with a recommendation. I agree, however, that it is a case where security should be called for under S. 106, Criminal P. C. I direct that each of the accused convicted furnish a bond for Rupees 200 and one security for a like amount to keep the peace for one year. The sureties to be to the satisfaction of the trying Magistrate. In default of providing security the accused will suffer simple imprisonment for one year. As regards the omission of the trying Magistrate to take any action in respect of the persons absconding, this is certainly a matter in which there has been a failure of justice. Apparently the Magistrate forgot all about the absconders, but such negligence is regrettable and it can only lead to general contempt of authority if criminals who evade service of process are let off punishment altogether. I direct the trying Magistrate to take action against the absconders under Ss. 87 and 88, Criminal P. C., simultaneously and to see that that action is effective and that these persons are duly brought to trial."

Judgment.—This application succeeds. The District Magistrate had no power to direct that each of the accused convicted furnish a bond for Rs. 200 with one surety for a like amount. At the time when he passed the order he was not trying the case as a Court of appeal. I direct that the order be set aside and any security, that may have been furnished, be quashed. Let the record be returned.

V.B./R.K.

Order set aside.

* A. I. R. 1918 Allahabad 216 (2)

RICHARDS, C. J. AND BANERJI, J.

Jurawan and others—Judgment-debtors—Appellants.

v.

Mahabir Dube and another—Decree-holders—Respondents.

Execution Second Appeal No 596 of 1917, Decided on 2nd January 1918, from decree of Addl. Dist. Judge, Gorakhpore.

* (a) Civil P. C. (1908), S. 48—"Subsequent order directing payment of money" refers to order of Court passing decree and not of Court executing it—Order of Court granting time to judgment-debtor does not extend time—Civil P. C. (1908), O. 20 R. 11.

"A subsequent order directing payment of money," in S. 48 (b), means a subsequent order made by the Court which made the decree and acting as that Court, and not an order of a Court

executing a decree. In all probability the section contemplates orders made under O. 20, R. 11 of the Code.

An order of an executing Court granting time to the judgment-debtor is not a "subsequent order directing payment of money" within the meaning of S. 48 and does not operate to extend the period of limitation for the execution of the decree. [P 218 C 1]

(b) Civil P. C. (1908), S. 48—S. 48 does not in strict sense provide period of limitation.

Section 48 does not in a strict sense provide a period of limitation. It is an enactment which forbids an order for execution upon a decree which is more than twelve years old. [P 218 C 1]

* (c) Limitation Act (1908), S. 15—Granting time to judgment-debtor is not order staying execution.

An order granting time to the judgment-debtor is not an order staying execution of the decree within the meaning of S. 15. [P 218 C 1]

(d) Limitation Act (1908), S. 15—'Prescribed' refers to periods prescribed by that Act and does not apply to Civil P. C. (1908), S. 48.

The word "prescribed" in S. 15, Lim. Act refers to periods prescribed by that Act, and has no application to the provisions of S. 48, Civil P. C. [P 218 C 1]

Peary Lal Banerji—for Appellants.

Radha Kanta Malaviya—for Respondents.

Judgment.—This appeal arises out of execution proceedings. The decree was dated as far back as 28th June 1904. In March 1915, an application was made for execution by attachment of certain property of the judgment-debtor. On that application (23rd September 1915), two months' time was granted to the judgment-debtor to pay the balance of the decretal amount, he having paid Rs. 22 on account. No further step appears to have been taken on this application and it was struck off. On 6th September 1916, the present application was made. It sought execution in a different way. The application of 31st March 1915 was for execution by attachment of property. In the application of 6th September 1916, execution was sought by the arrest of the judgment debtor. The judgment debtor raised an objection that having regard to the provisions of S. 48, Civil P. C., the decree being now more than twelve years' old, an order for execution could not be made. The First Court allowed the objection. The learned District Judge upon appeal held, first, that the application was within time holding, that the twelve years mentioned in S. 48 ran from 1915 and secondly, that the application was within time under Art. 179, Cl. 4, Lim. Act. The judgment-debtor has appealed.

The learned vakil, for the decree holder, admits that Art. 179, Cl. 4, Lim. Act does not apply, but he contends that the order of 23rd September 1915, when the judgment-debtor was allowed two months to pay the decree, was a "subsequent order," within the meaning of that expression in S. 48, Cl. (b), Civil P. C., and secondly, that in calculating the period of twelve years mentioned in S. 48, Civil P. C., the two months, which were given to the judgment debtor by the order of 23rd September 1915, should be excluded having regard to the provisions of S. 15, Lim. Act. Amongst the authorities cited by each side were *Ram Nath Tewari v. Chatterpa-man Tewari* (1), *Jogobundhoo Dass v. Hori Rawoot* (2), *Balchand v. Raghunath Das* (3), *Raghunath Prosad v. Kashi Prosad* (4), *Tata Charlu v. Konadala Ramachandara* (5) and *Perumal Naickar v. Davood Rowther* (6). S. 48, Civil P. C., is as follows:

"Where an application to execute a decree not being a decree granting an injunction has been made, no order for the execution of the same decree shall be made upon any fresh application presented after the expiration of twelve years from (a) the date of the decree sought to be executed, or (b) where the decree or any subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods, the date of default in making the payment or delivery in respect of which the applicant seeks to execute the decree."

As already mentioned, it is contended that the order of 23rd September 1915, giving the judgment-debtor two months' time, is a subsequent order directing the payment of the balance of the money. It must be remembered that this order was made by the Court executing the decree. It may perhaps have so happened in this case that it was the same Court which granted the decree of 28th June 1904, that was executing the decree. But if the argument put forward by the decree-holder is good, it would equally apply to a case where the decree had been merely transferred to another Court for execution. It would almost seem to follow that even an adjournment of an application for execution would give a fresh period of twelve years from the expiry of the period of adjournment. After consideration we have come to the conclusion

1. (1915) 37 All 698=30 I C 521.

2. (1889) 16 Cal 16.

3. (1881) 4 All 155.

4. (1912) 13 I C 88.

5. (1884) 7 Mad 152.

6. (1916) 34 I C 393.

that a subsequent order directing payment of money in S. 48, Cl. (b), means a subsequent order made by the Court which made the decree and acting as that Court, and not an order of a Court, executing a decree. In all probability the section contemplates orders made under O. 20, R. 11. We may say in passing that the order of 23rd September 1915 was not made under O. 20, R. 11. As to the argument put forward grounded on the provisions of S. 15, Lim. Act, this section runs as follows:

"In computing the period of limitation prescribed for any suit or application for the execution of a decree, the institution or execution of which has been stayed by injunction or order, the time of the continuance of the injunction or order, the day on which it was issued or made, and the day on which it was withdrawn shall be excluded."

In the first place, the order of the 23rd of September was not strictly an order staying the execution of the decree. Furthermore, the Limitation Act itself prescribes periods of limitation for bringing suits and periods of limitation for the execution of decrees, and it seems pretty clear that the word "prescribed" in this section refers to periods prescribed by the Limitation Act. S. 48, Civil P. C., does not in a strict sense provide a 'period' of limitation. It is an enactment which forbids an order for execution upon a decree which is more than twelve years old. We must allow the appeal, set aside the order the Court below and restore the order of the Court of first instance with costs in all Courts.

V.B./R.K.

Order set aside.

A. I. R. 1918 Allahabad 218

TUDBALL, AND ABDUL RAOOF, JJ.

Darshan Das — Opposite Party — Appellant.

v.

Collector of Meerut and another — Petitioners—Respondents.

Civil Revn. No. 122 of 1918, Decided on 4th July 1918 from order of Dist. Judge, Meerut. D/- 9th February 1918.

Civil P. C. (1908), S. 92—Mismanagement of religious trust—District Judge cannot interfere on application of private person until regular suit is filed—Code lays down regular procedure for suit.

The Civil Procedure Code does not give a District Judge any power to interfere with the management of a religious trust unless and until a regular suit is filed in his Court, when it is open to him to exercise all the powers which the Code gives him in order to protect the property. He has no power to interfere and to suspend a

trustee from his post on the application of a private person who has called attention to the fact that a breach of trust appears to have been committed. The Civil Procedure Code lays down a regular procedure for suits in such cases and until the Court is moved in that way, it has no power of supervision to interfere and to pass orders.

[P 219 C 1]

A. H. C. Hamilton—for Appellant.

W. Wallach and H. K. Mukerji — for Respondents.

Judgment.—The facts of this case may be briefly stated. One Puran Atal was the manager of a certain gaddi. It is an admitted fact that the gaddi in question is a trust for religious purposes. Puran Atal was removed from his position as trustee by the order of the District Judge of Meerut on 7th May 1909. The present appellant Darshan Das was appointed in his place and certain directions were given to him among which was one that he should file accounts annually in the month of January. In 1913 two suits were brought against Darshan Das under S. 92, Civil P. C., both of which failed. In 1916 Puran Atal filed an application before the District Judge calling attention to the fact that Darshan Das had never filed any accounts and making certain allegations against him. The District Judge started an inquiry, in the course of which the Collector of Meerut applied through the Government Pleader asking the Court to make some arrangements for the better management of the gaddi. Notice was issued to Darshan Das and efforts were made to bring him into Court. For reasons with which we are not now concerned, he did not appear and the District Judge made an ex parte enquiry and finally passed the order of 9th February from which the present appeal has been preferred. The order was as follows:

"Mabaut Darshan Das is prohibited from having any further dealings with the property of the gaddi. Proclamation will be made in the villages belonging to the gaddi that Darshan Das is prohibited from receiving rents or revenues acting in any way on behalf of the gaddi for the future."

Certain gentlemen appeared and they were also appointed as a sort of committee to look after the estate, and the Judge suspended Darshan Das from his post pending the filing of a regular suit under S. 92, Civil P. C. We also note that more than five months have passed and no attempt whatsoever has been made to file any such suit or to obtain the sanction which is necessary under S. 92 for the

filing thereof. A preliminary objection is taken that no appeal is allowed by the Code from the order which was passed. As far as we are able to judge the order has been passed without any jurisdiction whatsoever. The preliminary objection therefore, has force namely, that no appeal lies. At the same time we are asked to treat this as an application in revision and we think that in the circumstances of the case we ought to do so. If Puran Atal had shown any activity or energy in obtaining sanction or in bringing a suit under S. 92 we might have been prepared to reject this appeal on the ground that no appeal lies and to have refused to treat this as an application in revision, because in all probability the matter would come before the Court at a very early date in a regular suit, but it is to the interest of Puran Atal to delay in bringing such a suit and already a delay of some five months has occurred. We therefore, think it best that we should take up this matter in revision. As we have pointed out, the order is clearly without jurisdiction. There is no suit under S. 92 pending before the District Judge.

The Code gives him no powers to interfere in this matter unless and until a regular suit is filed in his Court, when it will be open to him to exercise all the powers as to the appointment of a Receiver, etc., the Code gives him in order to protect the property. We fail to see that he has any powers to interfere, as he has done in this case; and to suspend a trustee from his post on the application of a private person who has called attention to the fact that a breach of trust appears to have been committed. The Code lays down a regular procedure for suits on such facts as have been brought to the notice of the Court and until the Court is moved in that way, the Judge certainly has no power of supervision to interfere and to pass such an order. We, therefore, set aside in revision the order passed by the Court below suspending Mahant Darshan Das and prohibiting him from having anything to do with the estate. The Court below has also passed an order directing that the fees of the Government Pleader and the Collector's costs should be met from the gaddi funds. We can see no justification for such an order. That order will also be set aside. The Collector will have to bear his own costs. We think also that in the circumstances of

this case, the other two parties to this matter should also bear their own costs throughout the litigation.

V.B./R.K.

Order set aside.

A. I. R. 1918 Allahabad 219

PIGGOTT AND WALSH, JJ.

Ram Dulari—Defendant—Appellant.

v.

Hardwari Lal and others—Plaintiffs—Respondents.

First Appeal No. 57 of 1916, Decided on 15th April 1918, from decree of Sub-Judge, Shahjahanpur.

Limitation Act (1908), Art. 116—Sale-deed containing covenant of indemnity—Breach of covenant—Suit for damages—Time begins to run when actual loss is suffered.

A sale-deed recited that the property was sold free from all debts or liabilities, and contained a covenant that in the event of the vendees having to pay some excess amount, that is to say, some further charge over and above the sale consideration set forth in the deed, estate of the vendor would be liable to make it good together with damages and costs. It subsequently transpired that the property was subject to a mortgage and on the basis of that mortgage a decree was passed against the vendees alone with the original mortgagor. In order to save the property from sale under that decree, the vendees had to pay up the mortgage money along with interest and costs. They then sued their vendor to recover the sum paid by them under the mortgage decrees :

Held : that the plaintiffs were entitled to rely upon the covenant contained in the deed as a covenant of indemnity and to bring a suit upon it, the limitation for which began to run from the date on which they suffered actual loss by reason of their being compelled to pay off the prior mortgage charge. [P 221 O 1]

Tej Bahadur Sapru and Sarat Chandra Chaudhri—for Appellant.

Baldev Ram Dave—for Respondents.

Piggott, J.—This is an appeal by the defendant in a suit which, as brought, was a suit for damages on account of the breach of a covenant of indemnity contained in a sale deed of 4th July 1901. That deed in itself arose out of and formed the completion of a transaction embodied in a previous deed of 9th January 1899. The plaintiffs in this case represent the transferees of the vendees under these two deeds and the defendant the vendor in each of these deeds. The vendor purports to convey certain property free of all encumbrances, and in each of them there is a covenant setting forth what is to happen in the event of its being found that the property is in fact encumbered, and in the event of the vendees being disturbed in possession or having to make

any payment on account of some previously existing encumbrance. The matter is clearer in the earlier of the two deeds but no doubt the point has to be decided with reference to the agreement as embodied at the end of the deed of 4th July 1901, on p. 8 R of the book before us. We have only referred to the previous document in order to explain the nature of the transaction as throwing light on the intention of the parties and the footing on which they were dealing with one another. Unfortunately in the deed of 4th July 1901 there has been a clerical error on the part of the scribe in that very portion of the document which is most material for our purpose. We are not sure that this error is really vital to the decision of the question argued before us, but the error is there and it is as well that attention should be called to it. A certain word in the deed may have been intended to be written as "Maqabal" or as "Fazil." As the document stands it is actually written "Faqabal," which is nonsense, but it must be intended to be read as one or other of these two words. Now, on the reading the one expression is correctly translated in our paper book by the words "or if any excess amount is charged against them" on the other reading, we may translate "or if they are held chargeable with any prior encumbrance." The latter of these two readings would be less favourable to the appellant's case and for the purposes of argument we may adopt the former. The covenant then is that, in the event of the vendees having to pay some excess amount, that is to say, some further charge over and above the sale consideration set forth in the deed, the estate of the vendor will be liable to make it good, together with damages and costs. Immediately before the words above set forth there is a recital that the property is conveyed to the vendees free from all debts and liabilities or claims. Then follows the agreement that if any portion of the property passes out of the possession of the vendees, or they fail to obtain possession or finally in the alternative if any excess amount is charged against them, the other property of the vendor will be liable for damages. It subsequently transpired that there was a prior encumbrance on the property conveyed in the sale of a mortgage in favour of the Chatrī Lal. A suit was brought on this mortgage in which the

present plaintiffs the vendees were impleaded along with the original mortgagor. The claim was contested, but resulted finally in a decree in favour of Chatrī Lal, and in order to save the property from sale under that decree the present plaintiffs, the vendees under the deed of 4th July 1901 had to pay up the sum now claimed by them, consisting of the mortgage money due to Chatrī Lal along with interest and costs. In the Court below this claim was resisted upon a variety of pleas, some of which are repeated in the memorandum of appeal now before us but the appeal has been argued upon one ground only, namely on the plea of limitation.

There was an issue on this point in the Court below (issue 5), and the learned Subordinate Judge disposed of it very briefly, by pointing out that in his opinion the cause of action accrued to the plaintiffs in the month of May 1915 when they had to pay the money to Chatrī Lal and that this plaint had been filed with great promptitude in the month of July 1915. He held therefore that it was clearly within time. Curiously enough, in the memorandum of appeal before us this finding on the question of limitation is not in express terms challenged. We have been told however that there has been some error or oversight about the drafting of the memorandum of appeal and that the plea taken in para. 1 was intended to read, "that the plaintiffs had no subsisting cause of action," and so raised the question of limitation. At any rate we have heard the appellant on this point, and it was within our discretion to do so. The plea is based upon the contention that the agreement embodied in the last paragraph of the deed of 4th July 1901 was simply a covenant of title, that there was a breach of this covenant the moment the deed itself was executed, that a cause of action accrued to the plaintiffs on that very date and that consequently the present suit is barred under the six years' rule of limitation. As subsidiary arguments on this point our attention has been drawn to the fact that the mortgage in favour of Chatrī Lal was a registered document, of which it might be said that the plaintiffs had constructive notice, and that in any event they had actual notice of it when Chatrī Lal instituted his suit, which was as long ago as the year 1902. The argument before us has proceeded

upon lines which evidently were not followed in the Court below. Our attention has been drawn to a number of rulings, of which the decision most in point is that in *Hare Tiwari v. Raghunath Tiwari* (1). What that case seems to us to lay down is that, if the plaintiffs in a suit like the present were bound to rely solely upon a covenant of title, whether express or implied, it might be held that limitation ran against them from the date of the execution of the deed; but in that suit itself a distinction was drawn and the plaintiffs were held to be within time, because they were not suing upon a mere covenant of title, and it was held that their cause of action arose long subsequently when they were disposed of a portion of land then in question.

Similarly in the present case, it seems to us that the plaintiffs are entitled to rely upon the words already set forth as a covenant of indemnity and to bring a suit upon them from the date on which they suffered actual loss by reason of their being compelled to pay off the prior mortgage charge. The decision of the Court below on the issue of limitation therefore appears to be substantially correct on the ground on which it proceeds, although the point was not fully argued. The appeal therefore fails and we dismiss it with costs.

V.B./R.K. *Appeal dismissed.*

1. (1889) 11 All. 27 (FB).

A. I. R. 1918 Allahabad 221 (1)

RICHARDS, C. J. AND BANERJI, J.

Kalyan Singh and another—Defendants—Applicants.

v.

Allah Diya — Plaintiff — Opposite Party.

Review Appln. in Letters Patent Appeal No. 99 of 1916, Decided on 26th October 1918.

Letters Patent (Allahabad), S. 10—Decree under—Review is not permissible.

No application for review is allowable where the decree sought to be reviewed was given in an appeal under S. 10. [P 221 C 1]

J. M. Banerji—for Applicants.

Hameedullah and S. M. Y. Hasan—for Opposite Party.

Judgment.—A preliminary objection has been taken to the hearing of this application that no application for review is allowable where the decree was given in an appeal under S. 10, Letters Patent. It was so held in the case of *Hafiz Muhammad*

Mohsin v. Sheo Prasad (1). This decision is binding on us. We accordingly reject the application with costs.

V.B./R.K. *Application rejected.*

1. (1904) 1 A L J 509.

A. I. R. 1918 Allahabad 221 (2)

PIGGOTT, J.

Mansukh Ram and others—Defendants—Appellants.

v.

Birjraj Saran Singh—Plaintiff—Opposite Party.

Civil Revn. No. 229 of 1917, Decided on 27th May 1918, from order of Munsif, Meerut.

(a) *Agra Tenancy Act* (1901), S. 167—Occupancy tenant cutting down trees belonging to landlord—Suit for damages held cognizable by Court of Small Causes—Suit is not barred under S. 167.

Defendants, occupancy tenants, cut down two trees belonging to the plaintiff-landlord, which stood within the boundaries of their holding. Plaintiff filed a suit for damages against the defendants in the Small Cause Court.

Held: (1) that apart from any provision of the *Agra Tenancy Act* restricting the jurisdiction of the civil Courts in such a matter, the plaintiff's claim for damages on account of the tortious act of the defendants was cognizable by a Court of Small Causes. [P 222 C 1]

(2) that S. 167 did not debar the plaintiff from claiming damages in a civil Court on the simple allegation that the defendants had taken advantage of their position as tenants of the land in order to cut down and appropriate to themselves trees which were the property of the plaintiff. [P 222 C 2]

(b) *Agra Tenancy Act* (1901), S. 57—Trees on occupancy holding cut down—Act cannot be presumed to be detrimental to land.

The cutting down of trees standing on the holding by an occupancy tenant does not raise a presumption that the act is detrimental to the land within the meaning of S. 57. [P 222 C 1]

Haribans Sahai—for Applicants.

M. L. Agarwala—for Opposite Party.

Judgment.—The applicants in this case are certain defendants against whom a decree for Rs. 15 as damages has been passed in favour of the plaintiff by the learned Munsif of Meerut in the exercise of his jurisdiction as Judge of a Court of Small Causes. The question raised by this application is whether the cognizance of the Court below was or was not barred by the provisions of S. 167, U. P. Tenancy Act, Local Act 2 of 1901. Putting aside certain matters of detail no longer in controversy, the essential facts may be stated thus: The defendants were tenants with a right of occupancy of two plots of agricultural land, the property of the plaintiff. Somewhere within the

boundaries of this agricultural holding there stood two trees, which were not the property of the defendants but of the plaintiff. The defendants cut down those trees and appropriated the timber thereof to their own use. It scarcely requires to be pointed out that, apart from any provision of the local Tenancy Act restricting the jurisdiction of the civil Courts in such a matter, the plaintiff's claim for damages on account of this tortious act was clearly cognizable by a Court of Small Causes and on the facts found, the decree in favour of the plaintiff is a proper one.

The only question therefore is whether the suit is barred by the provisions of S. 167 aforesaid. This again depends upon the interpretation to be put upon certain provisions of Ss. 57 and 65 of the same Act. The latter of these sections merely says that, if a tenant is found liable to ejectment from his holding on any of the grounds specified in Cl. (b) or Cl. (c), S. 57, the Revenue Courts have jurisdiction to give the landholder a decree for compensation in lieu of, or in addition to the ejectment of the tenant. The question therefore is whether, on the facts alleged in the plaint, the defendants were liable to ejectment under the provisions of S. 57 aforesaid. I am unable to hold that the cutting down of the two trees under the circumstances alleged was an act detrimental to the land. There is certainly no presumption to that effect; on the contrary, in so far as the land is used for cultivating purposes, the removal of these two trees would presumably be calculated to increase its productiveness. The only question therefore is whether the act of the defendants in cutting down these trees could have been proved by the plaintiff, in a proceeding in the Revenue Courts, to have been an act inconsistent with the purpose for which the land was let to the defendants. There is no allegation to this effect in the plaint; and I am bound to say that in my opinion the plaintiff would have had considerable difficulty in satisfying a Revenue Court that this land had originally been let to the defendants under such circumstances as would make the cutting down of these trees an act inconsistent with the purpose for which the lease was given. If any landholder under similar circumstances feels himself able to establish such a plea by evidence, I would by no

means debar him from seeking the protection of the Revenue Courts, but in the present case I find no reason for holding that the plaintiff was in any way debarred from claiming damages in a civil Court, on a simple allegation that the defendants had taken advantage of their position as tenants of the land in order to cut down and appropriate to themselves two trees which were the property of the plaintiff. I have been referred in argument to a number of rulings supposed to have some bearing upon the question in dispute but I do not think it necessary to discuss them here. Most of them seem to me to have no bearing upon the particular point to be decided in this case. The only one about which I should not be prepared to say this is the decision of a single Judge of this Court in *Lachman Das v. Mohan Singh* (1). That decision, so far as the question of jurisdiction is concerned, is entirely against the defendants. I take the liberty of saying, with all respect to the learned Judge of this Court who decided that case, that he has gone somewhat further in the way of affirming the jurisdiction of the civil Court to deal with matters of this sort than I should myself be prepared to do, at any rate, without further argument; but as regards the case now before me I find no good reason for holding that the plaintiff could have obtained appropriate relief for the loss which he has suffered by way of any suit or application brought or made before a Revenue Court. The jurisdiction of the learned Judge of the Court of Small Causes was therefore not barred and I dismiss this application with costs.

V.B./R.K. *Application dismissed.*

1. (1912) 14 I C 582.

A. I. R. 1918 Allahabad 222

RAFIQUE, J.

Drig Pal Singh—Plaintiff—Applicant.

v.

Kunjai—Defendant—Opposite Party.
Civil Revn. No. 194 of 1917, Decided on 15th December 1917, from order of Sm. C. C. J., Fatehpur.

Provincial Small Cause Courts Act (9 of 1887), Art. 31—Suit for mesne profits of grove wrongfully received by defendant is not cognizable.

A suit to recover mesne profits of a grove which the plaintiff has been wrongfully kept out of

possession of by the defendant, falls under Art. 31 and is not cognizable by a Small Cause Court.

[P 223 C 1]

Purusottam Das Tandon—for Applicant.

Mangal Prasad Bhargava — for Opposite Party.

Judgment.—This is an application in revision from the order of the Small Cause Court at Fatehpur returning the plaint to be presented to the proper Court. It appears that the plaintiff-applicant sued to recover mesne profits of a grove from which he said he had been wrongfully kept out of possession for three years by the opposite party. The learned Judge considered that the claim of the applicant fell under Art. 31, Sch 2, Small Causes Courts Act, and was not therefore cognizable by him. He accordingly returned the plaint for presentation to the proper Court.

He is supported in the view of the law he has taken by a case of this Court, i. e., *Sheo Bodh v. Surjan* (1), as also by several cases of the Bombay and the Madras High Courts. For the applicant reliance is placed on the Full Bench ruling of *Kunjo Behary Singh v. Madhub Chundra Ghose* (2). The view taken by the Calcutta High Court seems to have been adopted by this Court about eighteen years ago in the case of *Prasadi Lal v. Imdad Husen* (3). The facts of that case are not quite the same as those of the present case. In the case of *Prasadi Lal v. Imdad Husen* (3) the plaintiff had sued for damages for wrongful eviction. In the present case the plaintiff is suing for the mesne profits of the property from which he was kept out of possession for three years. The case of *Prasadi Lal v. Imdad Husen* (3) does not apply to the present case. The application fails and is dismissed with costs. Let the original plaint be returned.

V.B. /R.K. *Application rejected.*

1. (1913) 19 I C 427.

2. (1896) 28 Cal 884 (F B).

3. (1898) A W N 10.

A. I. R. 1918 Allahabad 223

PIGGOTT AND WALSH, JJ.

Ganeshi Lal—Plaintiff—Appellant.

v.

Babu Lal and others—Defendants—Respondents.

First Appeal No. 281 of 1916, Decided on 4th February 1918, from decree of Sub-Judge, Dehra Dun.

Hindu Law—Partition—Reopening—There is mutual right of indemnity in respect of paramount claim by third person throwing burden of loss unfairly upon one party—Discovery of mistake—Partition can be reopened to apportion loss.

Where parties arrive at a partition either by agreement, or by a decree, which is only a more solemn and binding form of agreement, there is an implied and mutual right of indemnity or contribution in respect of any paramount claim by a third person which throws the burden of a loss not contemplated in the partition proceedings unfairly upon one of the parties. If the original decision has been arrived at by a common mistake, which in the case of a decree has been adopted by the Court making the decree the mistake can be set right pro tanto, i. e., the partition can be opened up in so far as is necessary to apportion the loss which arises out of the discovery of the mistake. [P 225 C 2]

Gulzari Lal—for Appellant.

Surendra Nath Sen—for Respondents.

Piggott, J.—This is an appeal by a plaintiff whose suit for partition has been dismissed by the Court of the Subordinate Judge of Dehra Dun and Mussoorie. One of the pleas taken in the written statement was that that Court had no jurisdiction to try the suit at all. So far as we can gather from the judgment of the learned Subordinate Judge, he seems to have found that he had no jurisdiction to try the whole suit but had jurisdiction to try part of it, and he has therefore proceeded to try what he regards as a preliminary question sufficient to determine that portion of the suit which he conceived himself to have jurisdiction to try. The conclusion we have come to is that the Court below either had jurisdiction to try the entire suit, or had no jurisdiction to try any part of it. Further, we are of opinion that the decision pronounced with regard to a portion of the plaintiff's claim proceeds upon erroneous principles of law and is calculated to make it impossible for the plaintiff in any event to litigate a possibly just claim any further. We must therefore set aside the decree of the Court below and remand the case to that Court under the provisions of O. 41, R. 23, Civil P. C. In so doing however we must make it quite clear that we do not feel able on the materials before us finally to determine the question of jurisdiction. We leave that question still open and the Court below, after receiving this order of remand, should again take that point into consideration at once and pass appropriate orders, according as to whether it finds

that it has or that it has not jurisdiction to try the suit.

The said suit arises out of the following state of facts. Ganeshi Lal the plaintiff and Babu Lal the principal defendant are brothers. They were admittedly up to the year 1910 members of a joint undivided Hindu family. In the year 1910 Babu Lal brought a suit for partition against Ganeshi Lal. The specification of the property sought to be partitioned given at the foot of the plaint sets forth a number of houses situated in the town of Pilkhna in the Meerut district, and the suit was accordingly filed in the Court of the Munsif of Ghaziabad, within whose territorial jurisdiction the said property was situated. In his defence Ganeshi Lal raised a question as to whether the plaint contained a complete specification of the property which ought to be brought under partition. He pleaded that Babu Lal and himself were the joint owners of a shop at Landhour, the Cantonment of Mussoorie, that this shop was an ancestral business carried on for the benefit of both parties, that it had not been doing well and that there were heavy liabilities attaching to the business. His written statement implies, if it does not actually state, that this shop or business at Landhour was in the possession and under the management of Ganeshi Lal, and it is suggested that Babu Lal's object in suing for the partition of the joint family property at Pilkhna, while omitting all mention of the Landhour business, was to saddle his brother Ganeshi Lal with all the liabilities of that business while taking for himself his full half share in the joint property, some of which it was contended had been purchased out of the profits of that business at a time when such profits were available.

This pleading obviously raises questions of fact and of law which the Court conducting the partition would have had to determine before any decree could be passed; but as a matter of fact the case was settled by a compromise between the two brothers. The precise effect of that compromise as regards the business at Landhour is a matter of controversy in the present suit; but it is sufficient to note that its result was to partition the immovable property at Pilkhna in a particular manner. One large house was divided between the brothers in equal

shares, the eastern portion being assigned to Babu Lal and the western portion to Ganeshi Lal. Certain other houses were assigned, some to one brother and some to the other, and in respect of one house it was provided that it should continue in the joint possession of both parties. A decree was passed on 21st December 1910 in the terms of the compromise. In the year 1914, one Khairati Lal, a cousin of the parties, instituted a suit in which he claimed to recover possession of one-half share of the whole of the property which had been dealt with in the partition of 21st December 1910, alleging himself to be the owner of the same and asking that his moiety might be divided by metes and bounds from the rest and he be put into possession. This suit was contested by both the brothers, who denied that Khairati Lal had any right or title in respect of any share whatever in this property; but the suit was decreed in Khairati Lal's favour on 3rd February 1915. The result of this decree was that the western portion of the largest of the houses in question, that is to say, the portion which had been assigned to Ganeshi Lal at the partition of 1910 was awarded to Khairati Lal; and along with this one smaller building described as a shop with a kuchcha house appertaining thereto and another kuchcha built house were awarded to Khairati Lal out of the property allotted to Babu Lal in 1910. The plaintiff claims that in consequence of the success of Khairati Lal's suit he is entitled to re-open the question of the distribution of the joint family property and more particularly of the immovable property, effected at the partition of 1910.

We must take it that at that time Ganeshi Lal and Babu Lal honestly believed themselves to be the sole owners of the property in their possession which they then partitioned amongst themselves. There was therefore a bona fide mistake on the part of both parties to the partition and that mistake has now become apparent and has produced inequitable results because of the success of Khairati Lal's suit. There is good authority for the proposition that under such circumstances the party to the partition who finds himself prejudiced as a consequence of the common mistake is entitled to have the question of the partition re-opened. A very clear case on this point is that of

Maruti v. Rama (1). We agree with the principles laid down by the learned Judge who decided that case and we think that they to apply the case now before us. Ganeshi Lal however has chosen to complicate the question in two ways. He wishes to re-open not merely the question of the division effected of the house property at Pilkhna by the partition of 1910, but also the question then raised by him as to the respective rights and liabilities of himself and his brother in connexion with the business at Landhour. Believing apparently that he could do this more effectually by means of a suit instituted in the Court within whose territorial jurisdiction this Cantonment is situated, he has brought the present suit not in the Court of the Munsif of Ghaziabad, but in that of the Subordinate Judge of Dehra Dun and Mussoorie. The question whether that Court has any jurisdiction to entertain this plaint depends simply on whether or not any immovable property sought to be partitioned is situated within the territorial jurisdiction of that Court. The provisions of S. 16, Cl. (b), Civil P. C., are quite clear in their application to the present case and inasmuch as the defendant Babu Lal does not live or carry on business within the jurisdiction of the Subordinate Judge of Dehra Dun and Mussoorie, no possible question arises as to the effect of any subsequent section of the same Code. Either the Court below had jurisdiction to entertain the whole of this suit or it had no jurisdiction to entertain it at all and this depends on what the parties meant in that Court when they spoke of the "shop" situated at Landhour. The wording of the plaint suggests that they were speaking only of a "business" possibly carried on in a hired shop; but it has been pressed upon us on behalf of the plaintiff that this point is not made clear beyond dispute by the record as it now stands before us and that there is room for further inquiry in the Court below.

The only other substantial point in the case turns on the wording of the compromise of 1910 and the decree passed in accordance therewith. We are not sure that we have all the materials before us for pronouncing a final opinion on this point and it is not advisable that we should endeavour to try this question on the merits before the question of jurisdiction.

tion has been finally determined. According to the defendant the effect of the compromise decree of 1910 was not merely to assign the business at Landhour with its assets and its liabilities whatever these might be entirely to the share of Ganeshi Lal; but it did this independently altogether of the partition of the joint property effected by the other portion of the compromise. Virtually the contention for the defendants is that the decision arrived at between the parties on their own compromise in December 1910 amounted to a decision that this Landhour business did not form part of the assets of the joint family but was entirely a matter for which Ganeshi Lal alone was responsible. This is a question which may yet have to be determined between the parties and it is possible that further evidence may be required before a decision can be pronounced. The point seems worth mentioning in order to make it clear that in saying that Ganeshi Lal is in our opinion entitled to have a repartition of the joint family property made in consequence of the success of Khairati Lal's suit we are not pronouncing any opinion one way or the other as to whether the assets or the liabilities of the Landhour business should or should not be taken into account in connexion with such re-partition. Our order therefore is that we remand this case to the Court below under O. 41, R. 23, for re-trial subject to the remarks we have made. We leave all costs of this appeal to be costs in the cause.

Walsh, J.—I entirely agree. I only wish to add one word on the point arising on the merits which was substantially argued before us. I agree with the decision in *Maruti v. Rama* (1), but I think that there is danger in stating as a general principle that proof of such matter entitles the party to re-partition. I do not think that it entitles him to open up the previous decision except in so far as is necessary to apportion the loss which arises out of the new fact. The right is based simply upon this principle that where parties arrive at a partition either by agreement or by a decree (which after all is only a more solemn and binding form of agreement), there is an implied and mutual right of indemnity or contribution in respect of any paramount claim by a third person which throws the burden of a loss not contemplated in

the partition proceedings unfairly upon one of the parties. If the original decision has been arrived at by a common mistake, which of course in the case of a decree is adopted by the Court making the decree the mistake can be set right *pro tanto*.

V.B./R.K.

Case remanded.

A. I. R. 1918 Allahabad 226 (1)

RICHARDS, C. J. AND TUDBALL, J.
Ramzan—Plaintiff—Appellant.

v.

Bhukhal Rai and *others*—Defendants—Respondents.

Second Appeal No. 1401 of 1916, Decided on 19th July 1918, against decree of Dist. Judge, Gorakhpur.

Agra Tenancy Act (1901), S. 20—Illegal usufructuary mortgage of occupancy tenancy—Suit to redeem held maintainable.

Plaintiff purported to make a usufructuary mortgage of an occupancy tenancy, which was illegal having regard to the provisions of S. 20. He then brought a suit to redeem the property:

Held: that the suit was maintainable and that the plaintiff was entitled to get back the property on payment of the mortgage money.

[P 226 C 2]

J. N. Misra and *Bhagawati Shanker*—for Appellant.

Surendra Nath Sen—for Respondents.

Judgment.—In this case it appears that the plaintiff purported to make a usufructuary mortgage of an occupancy tenancy, which was illegal having regard to the provisions of S. 20, Agra Tenancy Act. The present suit was instituted by the plaintiff in effect to redeem the property. The Court of first instance decreed the claim. The lower appellate Court reversed the decree of the Court of first instance and dismissed the plaintiff's suit upon the ground that the mortgage was null and void. It seems to us that this decision is wholly wrong and inequitable. It might be that if the plaintiff came into Court and asked to get back his property without payment of the mortgage money at all on the ground of the illegality of the transaction that the Court would put him upon terms of paying the mortgage money. Even this view is not universally taken, for one learned Judge at least has held that in such a case the owner of the occupancy tenancy could get back the property without paying the mortgage money. However in the present case the plaintiff very honestly comes in offering to pay the mortgage money. In our opinion he is

clearly entitled to get possession on so doing. We allow the appeal, set aside the decree of the lower appellate Court and restore the decree of the Court of first instance with this modification that, we decree the plaintiff's costs in all Courts, and that we decree that the time for payment be extended for six months from this date.

V.B./R.K.

Decree modified.

A. I. R. 1918 Allahabad 226 (2)

RICHARDS, C. J. AND BANERJI, J.
Sripat Narain Rai—Opposite Party—Appellant.

v.

Tirbeni Misra—Petitioner—Respondent.

Execution Second Appeal No. 686 of 1917, Decided on 2nd March 1918, from decree of Dist. Judge, Gorakhpur.

Civil P. C. (1908), O. 21, R. 7 and O. 22, R. 6—Decree against dead man is nullity.

No Court can make a decree against a dead man and a decree so made is a nullity. No question of the jurisdiction of the Court to make the decree arises in such a case. It is a good answer to an application for execution against the alleged representatives of a judgment-debtor to show that the judgment-debtor was dead at the time the decree was made and that such a decree is void and incapable of execution as against the deceased.

[P 227 C 2]

Haribans Sahai—for Appellant.

Iswar Saran—for Respondent.

Judgment.—This appeal arises out of execution proceedings. It appears that a decree for pre-emption was obtained against three persons, one of whom was Bindeshri. It is alleged, and it is possibly correct, that all the three persons constituted a joint Hindu family. The question of jointness is not now before us. Bindeshri died and the present application was for execution against the surviving defendants and also against the sons of Bindeshri as his legal representatives. It was objected that Bindeshri had died before the decree was made. Having regard to the order of the Court below and to what happened when this case was before us on a previous occasion, we intend to deal with the case on the assumption that Bindeshri was dead at the time the decree was made against him. The lower appellate Court has dismissed the application for execution as against the sons of Bindeshri as his legal representatives. This Court has held in the case of *Imdad Ali v. Jagan Lal* (1)

1. (1895) 17 All 478.

that it is a good answer to an application for execution against the alleged representatives of a judgment debtor to show that the judgment debtor was dead at the time the decree was made, and that such a decree is void and incapable of execution as against the person so dead. This is an authority which we think we ought to follow unless it can be shown that it is no longer law. It is contended that there has been a change in the new Civil Procedure Code by the omission from O. 21, R. 7 of the word "jurisdiction." We think that this alteration in no way modifies the authority of the case to which we have referred. No question of "jurisdiction" of the Court to make the decree arises because no Court can make a decree against a dead man; and a decree so made is a nullity. In this view we think the decision of the Court below was correct. It is suggested that as the family is joint it was sufficiently represented by the members of the family who were alive when the decree was made, and it is unnecessary that the sons of Bindeshri should be named as judgment debtors. A good deal might be said for this contention particularly if the pre-emption money is accepted by the joint family, but we have not to decide this matter in the present appeal. We express no opinion as to what the effect of the execution of the decree against the surviving defendants will be. But we think the Court below was justified in dismissing the application for execution against the sons of Bindeshri as his legal representatives. The result is that the appeal fails and is dismissed with costs.

V.B./R.K.

*Appeal dismissed.***A. I. R. 1918 Allahabad 227**

RICHARDS, C. J. AND TUDBALL, J.

Surajbali Singh and others — Defendants—Appellants.

v.

Mohammad Nasir and others—Plaintiffs—Respondents.

Second Appeal No. 557 of 1917, Decided on 17th July 1918, from a decree of Dist. Judge, Azamgarh.

Pre-emption — Custom—Entry in wajib-ul-arz relied on as proof should be considered.

When considering the existence or non-existence of a custom of pre-emption the language of the entry in the wajib-ul-arz which is relied upon as a proof of the custom should be taken into consideration. Where a wajib-ul-arz

provided that when a stranger had obtained property under a sale or a mortgage, the cosharers, in a certain order, were entitled to take the property in the case of a sale at sixteen years' purchase and in the case of a mortgage at eight :

Held : that the entry was wholly insufficient to prove a custom of pre-emption. [P 228 C 1]

Tej Bahadur Sapru—for Appellants.*S. A. Haidar and Raza Ali*—for Respondents.

Judgment.—This appeal arises out of a suit for pre-emption. The plaintiff alleges that a custom of pre-emption prevailed and adduced in evidence an extract from the wajib-ul-arz of 1872. This is the only evidence adduced on behalf of the plaintiff of the existence of the custom. One has only to peruse the entry to come to the conclusion that it was almost impossible that this could have been a record of a custom. It provides amongst other things that as soon as a stranger has bought or mortgaged the property, the cosharers in a certain order are entitled to take the property in the case of a sale at sixteen years' purchase and in the case of a mortgage at eight. It further goes on to record a right of a person to redeem a mortgage in which he has no interest whatever. As against this piece of evidence (if it can be so called), the defendant vendee adduced a decree of the year 1878.

In that litigation the plaintiff, who now seeks pre-emption, had purchased a share in the village as a stranger. A suit was brought against him for pre-emption, the then plaintiff basing his claim upon this very entry in the wajib-ul-arz. The present plaintiff (then vendee) pleaded that there was no custom and that the record in the wajib-ul-arz was merely the record of a contract, which was not binding on his vendor, because it had not been verified by him. Reading the judgment in the previous litigation the then plaintiff and his advisers apparently hardly thought it possible to rely upon the entry in the wajib-ul-arz as the record of a custom. It was relied upon chiefly as the record of a contract. Had it been possible for the then plaintiff to rely upon it as a custom, it would have been greatly to his interest to do so, because he would have been saved from any real or supposed obligation to prove that the wajib-ul-arz had been verified by the then vendor. It may be mentioned in passing that the wajib-ul-arz was then

only about six years old, and presumably many of the persons who had verified it were still living. The lower appellate Court has found in favour of the plaintiff. In doing so the learned Judge has not discussed, or apparently considered, the language in the record in the *wajib-ul-arz*. The language of that document ought certainly to have been taken into consideration when considering the existence or non-existence of the custom. In dealing with the previous litigation the learned District Judge says :

"The only documentary evidence urged on behalf of the appellants is a copy of a judgment of the Subordinate Judge of Azamgarh, dated 31st May 1878. It appears that the plaintiff to this suit was a vendee in that case and that it was dismissed on a finding that a contract or custom of pre-emption was not proved. I think a solitary judgment does not rebut the presumption raised by the record of custom of pre-emption in the *wajib-ul-arz*."

From these remarks it would appear that the learned District Judge completely lost sight of the significance of the fact that the person who was now seeking to get the property had actually pleaded in the year 1878 that there was no right of pre-emption founded either upon custom or contract and that he had been successful in this plea. In our opinion there was no trial of the issue by the lower appellate Court on the evidence and we are entitled to deal with the evidence ourselves. As already pointed out, the sole evidence in support of the existence of the custom was the entry in the *wajib-ul-arz*, which (as we have already said) on the very face of it almost disproves that it is the record of a custom ; while on the other hand we have the plaintiff coming to this village as a stranger in the year 1878 after pleading successfully that there was neither custom nor contract. In our opinion the evidence was wholly insufficient to establish the existence of a custom. We accordingly allow the appeal, set aside the decrees of both the Courts below and dismiss the plaintiff's suit with costs in all Courts.

V.B./R.K. *Appeal allowed.*

A. I. R. 1918 Allahabad 228 (1)

TUDBALL, J.

Ratan Singh—Plaintiff.

v.

Khem Karan—Defendant.

Stamp Ref., Decided on 8th January 1917.

Court-fees Act (1870), Sch. 2, Arts. 5 and 17 (iii)—Suit for declaration of occupancy rights falls under Art. 5 and not under Art. 17 (iii).

A suit for a declaration of occupancy rights under S. 95, U. P. Tenancy Act, falls under Art. 5, Sch. 2, and the plaintiff in such a suit should bear a court-fee of eight annas.

[P 228 C 2]

Article 17 (iii), Sch. 2, of the Act has no applicability to such a suit. [P 228 C 2]

Judgment.—This is an appeal in a suit brought by the appellant for a declaration, under S. 95, Tenancy Act, that he has occupancy rights in a certain holding. The suit is purely a declaratory suit. The question is what is the court-fee payable on the appeal. *Prima facie* the suit falls clearly within Sch. 2, Art. 5, Court-fees Act, which lays down that on a plaint or memorandum of appeal in a suit to establish or disprove a right of occupancy a court-fee of eight annas should be paid. The only difficulty in the case arises by reason of two previous Judges of this Court having in similar cases directed that a fee of Rs. 10 was payable. In neither of these decisions was Sch. 2, Art. 5, apparently considered. The suit is not one to which Art. 17 (iii), Sch. 2, Court-fees Act, is applicable. As I have said above, it is purely a declaratory suit, and nothing more, in which the plaintiff seeks to establish that he has a right of occupancy. In my opinion the law is plain and the appeal is governed by Sch. 2, Art. 5, Court-fees Act, and the court-fee payable is eight annas according thereto. I so direct.

V.B./R.K. *Order accordingly.*

A. I. R. 1918 Allahabad 228 (2)

PIGGOTT, J.

Emperor.

v.

Bhagwani—Accused.

Criminal Revn. No. 158 of 1918, Decided on 16th March 1918, from order of Sess. Judge, Gorakhpur.

Criminal P. C. (1898), Ss. 423 and 439—Trial of two accused for kidnapping—On Appeal by one conviction set aside and commitment to Sessions ordered—Case of other referred to High Court—Pending reference order of commitment passed against both accused—Order held to be illegal.

Two persons were tried and convicted by a Magistrate for an offence under S. 363, Penal Code. On an appeal by one of them, the Sessions Judge set aside the conviction and sentence and ordered the appellant to be committed for trial on a properly framed charge under S. 366, Penal Code. The case of the other accused was referred to the High Court for the exercise of its

revisional jurisdiction. While the reference was pending before the High Court, the Trial Magistrate proceeded to pass an order of commitment against both the accused.

Held: that the Magistrate had no jurisdiction to pass the order of commitment while the conviction and sentence against one of the accused on his trial under S. 363, Penal Code remained standing, and that the order was therefore illegal and must be set aside. [P 229 C 1]

Judgment.—The learned Sessions Judge has been quite right to refer this case. The proceedings in the Magistrate's Court have been distinctly irregular. Two persons were sent up for trial, Achuta and Mt. Bhagwani, in connexion with an alleged offence of kidnapping under S. 363, I. P. C. The Magistrate framed the charge under that section, convicted both accused and sentenced them to rigorous imprisonment for eighteen months. Achuta appealed against his conviction, but Mt. Bhagwani did not. The learned Sessions Judge had jurisdiction to deal with the case of Achuta under S. 423, Criminal P. C. and he accordingly set aside the conviction and sentence and ordered Achuta to be committed for trial on a properly framed charge under S. 366 I. P. C. he being of opinion that the offence disclosed by the evidence, if committed, fell under that section and was exclusively triable by the Court of Session. The case of Mt. Bhagwani, who had not appealed, could only be referred to this Court for the exercise of its revisional jurisdiction. In the meantime, while the reference of the learned Sessions Judge was pending before this Court, the Magistrate has proceeded to pass an order of commitment against both Achuta and Mt. Bhagwani which he had not jurisdiction to do while the conviction and sentence against that accused person on her trial under S. 363, I. P. C., remained standing. Taking up the matter now in revision I set aside the conviction and sentence against Mt. Bhagwani under S. 363, I. P. C. I also set aside as irregular the commitment order which has been passed against this accused but I direct that, she be committed to the Sessions Court for trial so that she may be tried along with the other accused Achuta on a properly framed charge under S. 366 or 366/109, I. P. C.

V.B./R.K.

Commitment ordered.

A. I. R. 1918 Allahabad 229

PIGGOTT, J.

Khurshed Alam Khan and others—
Plaintiffs—Applicants.

v.

Rahmat Ullah Khan and another—
Defendants—Opposite Parties.

Civil Revn. No. 21 of 1917, Decided on 28th July 1917, from order of Dist. Judge, Gorakhpur.

Civil P. C. (1908), O. 47, Rr. 7 and 1—Appeal from order granting review on allegation that review application was made after expiry of period of limitation—Before allowing appeal Court must come to finding that application was made beyond time without sufficient cause.

The Legislature does not intend that the discretion of a Court in the matter of granting a review of its own judgment should be interfered with in appeal, except on the specific grounds set forth in O. 47, R. 7. [P 230 C 1]

An appellate Court is not entitled to reverse an order of the lower Court granting review of its own judgment without coming to a finding that the conditions laid down by O. 47, R. 7, have been completely fulfilled. [P 231 C 1]

Where an appeal is preferred from an order granting review of judgment on the ground that the application for review was made after the expiry of the period of limitation prescribed therefor, the appellate Court before allowing the appeal must come to a finding that the application for review was made beyond time without sufficient cause. [P 231 C 1, 2]

S.M. Sulaiman for Iqbal Ahmad—for
Applicants.

Harnandan Prasad for Iswar Saran—
for Opposite Parties.

Judgment.—This is an application in revision against an order of the District Judge of Gorakhpur admitting an appeal presented under O. 43, R. 1 (a), and O. 47, R. 7, Civil P. C., against an order of the Subordinate Judge of Basti granting an application for review of a certain judgment and decree of his own Court. No second appeal lies against the order of the District Judge and the only question which I have to consider is whether the applicants now before me, who were the plaintiffs in the suit, have brought their case within the purview of S. 115, Civil P. C. The facts of the case are somewhat peculiar. The plaintiffs' claim was one for possession of certain property together with mesne profits and certain other sums of money claimed as due to the plaintiffs under their cause of action. The claim was partly decreed and partly dismissed, and, as a matter of fact, the plaintiffs took out execution of the decree to the extent to which it was in their favour. They subsequently applied for

review of judgment and their application was allowed. The result of the review was that a declaration in their favour in respect of a certain item of property was substituted for the order dismissing their claim in respect of that property altogether which appeared in the original decree. Consequent upon this order there was a further decree in favour of the plaintiffs for a certain sum as mesne profits. There was also added to the decree an award in favour of the plaintiffs in respect of another small item of money, their claim to which had been dismissed in the decree as originally framed. It must be remembered that the defendants had a right of appeal against the amended decree: if that decree was wrong in law, or inequitable on the facts, the error could have been set right by the District Judge in a regular appeal from the decree. The defendants however, elected to exercise their alternative right of appeal against the order granting review of judgment.

Now this right has been rigidly limited by the provisions of O. 47, R. 7, Civil P. C., to certain very narrow grounds. The reasons for the limitations thus imposed upon the right of appeal from an order granting a review of judgment are obvious. A Court presumably only reviews a previous judgment of its own when it is satisfied that its previous judgment was wrong and unfair to one of the parties. If the judgment as passed upon review is in error, an appeal lies against it, as has already been pointed out. Consequently the Legislature does not intend that the discretion of a Court in the matter of granting a review of its own judgment should be interfered with in appeal, except on the specific grounds set forth in O. 47, R. 7, Civil P. C. The petition of appeal presented to the District Judge did not challenge the order granting review of judgment on any of the grounds set forth in Cl. (1) (a) and (b), R. 7, O. 47, Civil P. C. There was a plea that the application for review had been presented to the Subordinate Judge after the expiration of the period prescribed therefor. There was also a plea that the first Court had granted review of its judgment without sufficient cause; but it seems to me that it is at least open to question whether the memorandum of appeal presented to the District Judge can be regarded as challenging the order

granting review of judgment on the ground that the application had been made after the expiration of the period of limitation prescribed therefor and that it had been admitted without sufficient cause. That seems to be the meaning of Cl. (c), O. 41, R. 7 (1), Civil P. C. At any rate the District Judge has not decided this point. The question of limitation has not been dealt with in a very satisfactory manner by either of the Courts below. The learned Subordinate Judge merely takes note of the fact that the defendants have challenged the application for review of judgment on the ground of its having been presented after the expiration of the prescribed period of limitation, and he remarks that there is no force in this objection.

I think the learned Subordinate Judge was of opinion that because the application for review had been presented after 90th day from the date of the decree under the provisions of Art. 4, Sch. 1, Court-fees Act, 7 of 1870, no question of limitation could be raised in respect of it. I think this point is a very arguable one. I should feel considerable hesitation in holding that the plain words of Art. 173, Sch. 1, Lim. Act 9 of 1908 could be interpreted subject to anything contained in the Court-fees Act. On the other hand, nothing in the Limitation Act can be treated as limiting the inherent power of a Court to amend its own manifest errors, which is now expressly recognized by Ss. 151, 152 and 153, Civil P. C. As a matter of fact the application for review presented to the learned Subordinate Judge raised two distinct points. It called attention to what was unquestionably a mistake or error apparent on the face of the record, in that the decree as originally framed operated to dismiss the plaintiffs' claim for a certain small sum of money in respect of which the defendants had admitted liability in their written statement. In the second place, it raised a more debatable question in that it asked the learned Subordinate Judge to re-consider his decision dismissing altogether the plaintiffs' claim in respect of one of the items of immovable property specified at the foot of the plaint. That order of dismissal had been passed on the express ground that the plaintiffs claimed possession of a specified share of the said property, and had not sought either a decree

for joint possession to the extent of their share or relief by way of declaration.

The plaintiffs now took leave to point out to the Court that its decision apparently overlooked a paragraph of the plaint in which there was a general prayer for such alternative relief as the Court might consider suitable to the ascertained facts. The plaintiffs at the same time drew the attention of the Subordinate Judge to a reported decision of this Court, in which a decree for a declaration of title and for mesne profits had been granted on a state of facts substantially similar to those which the plaintiffs had established in the present suit. The learned Subordinate Judge granted a review on both points. It is certainly arguable that the latter of these two points cannot, without some straining of language, be regarded as a mistake or error apparent on the face of the record. As the same time the discretion conferred upon a Court by the words "for any other sufficient reason" in O. 47, R. 1, Civil P. C., is a wide one, and R. 7 of the same order does not provide for a right of appeal against the exercise of such discretion. In the present case moreover the learned Subordinate Judge found himself compelled to make one alteration in the decree passed by him, and he may well have considered that being thus seized of the whole matter he was entitled to take a liberal view of the extent of his jurisdiction in respect of the other question raised. The learned District Judge in appeal seems to have assumed that the first Court had entirely overlooked the provisions of Art. 173, Sch. 1, Lim. Act. He has remarked that the application for review was clearly beyond time under the provisions of that Article and has treated this finding as disposing of the entire question.

On behalf of the defendants it has now been contended before me that I ought not to interfere with the decision of the Court below merely on the ground that it seems to me to have taken an erroneous view of the question of limitation. To this I should be prepared to accede; but the objection to the decision of the learned Judge is that he has reversed the order of the first Court without coming to a finding that the conditions laid down by O. 47, R. 7, Civil P. C., as justifying interference in appeal with an order granting a review of judgment were completely fulfilled. He has not considered

at all the question whether the application for review was or was not made after the expiration of the prescribed period without sufficient cause. I think that on this ground I should be justified in setting aside the order of the Court below and sending back the appeal to be disposed of on the merits. After however having heard the parties at some length and fully examined the record before me, it seems to me useless to do this, and that the question of the order of the Subordinate Judge granting review of judgment should in the interests of the parties concerned be disposed of now once and for all.

As a matter of fact there had been an error committed by the first Court in the passing of its first decree, which was imminently calculated to give trouble at a subsequent stage in the event of any question of limitation being raised. According to the order sheet in the case, the learned Subordinate Judge delivered his judgment in the presence of the parties on 2nd December 1914, and an application for a copy of the judgment and decree was actually presented on the following day. In the meantime however the Court seems to have come to the conclusion that something further required to be done, or some document required to be inspected, before a final decree was passed, and it fixed 23rd December 1914 for further consideration of the case. On that date it reaffirmed the judgment previously delivered and directed a decree to be prepared accordingly. The result was that two decrees seem to have been drawn up. At any rate I find two decrees on the record: one dated 2nd December 1914 and the other dated 23rd December 1914. Such a procedure was obviously calculated to mislead the plaintiffs and to lead them into error as to the period available to them, either for presentation of an appeal or for presentation of an application for a review of judgment.

If they could be allowed to calculate the period of limitation from 23rd December 1914, and at the same time to add to the period necessary for obtaining a copy of the decree, the interval between 3rd and 23rd December 1914, during which their application for copy prematurely presented was lying in the copying department of the Court, they would actually bring themselves within

the limitation period, I do not say that this could be permitted; but it does seem to me that this was a case for the application of the provisions of S. 5, Lim. Act which, let it be observed, refer to an application for review of judgment as well as to appeals. If the learned Subordinate Judge, in admitting the application for review, had relied on S. 5 above mentioned, I do not think any question of limitation could possibly have been raised at any subsequent stage. That he did not do this in express terms may possibly have been due to the fact that he thought it unnecessary, and was more probably due to the view he took of the law of limitation applicable to an application for review of judgment stamped with the full fee payable. At any rate he did admit the application, and as there were in my opinion clearly sufficient grounds for its admission on the date on which it was presented, I do not think that any good purpose would be served by allowing this question of the review of judgment to be further litigated between the parties.

I only wish to add that, if the defendants should be advised even now that an appeal is maintainable against the decree as amended, or against any part of that decree, on any valid plea of law or of fact, I think that any Court to which such petition of appeal is presented would be well advised to take a liberal view of the provisions of S. 5, Lim. Act as applicable to the particular circumstances of this case, and as far as possible allow the defendants an opportunity, should they desire it, of having the more debatable of the two questions raised by the application for review of judgment finally decided on the merits. Subject to these remarks, I set aside the decree of the Court below and in lieu thereof pass a decree dismissing the appeal against the order of the Subordinate Judge granting review of judgment, with costs in this and in the lower Appellate Court.

V.B./R.K.

*Order set aside.***A. I. R. 1918 Allahabad 232**

TUDBALL, J.

Abinash Chandra — Appellant.

v.

Shekhar Chandra and others—Respondents.

Stamp Ref. in First Appeal No. 293 of 1916, Decided on 26th January 1918.

Court fees Act (1870), S. 7 (i) and (vi)—Suit to pre-empt five villages on payment of Rs. 2,500—Suit decreed in respect of two villages on payment of Rs. 2,100 and dismissed as to remainder—Appeal is divisible in two parts—Appellant must pay ad valorem as to part relating to two villages on amount sought to be reduced—As to other it is to be paid under S. 7 (vi).

Plaintiff sought to pre-empt five villages on payment of Rs. 2,500, alleging that the sum of Rs. 41,000 entered in the sale-deed was the ostensible amount of consideration. The suit was dismissed in respect of the villages and decreed in respect of the remaining two on payment of Rs. 21,000. The plaintiff appealed:

Held: (1) that the appeal being divisible into two parts and the sole question which arose in the part relating to the two villages being a question of consideration, the appellant must pay an ad valorem court-fee on the amount by which he was seeking to reduce the amount made payable by the lower Court. [P 233 C 2]

(2) that as regards the rest of the claim as the right to pre-empt was in dispute, the court-fee in respect thereto must be calculated according to S. 7 (vi). [P 233 C 2]

Taxing Officer's Report.—In this case the plaintiff claimed the right of pre-emption in certain shares of five villages on payment of Rs. 2,500, the actual consideration alleged being Rs. 44,000. In regard to three villages the claim was dismissed, and in regard to the other two it was decreed on condition of the payment of Rs. 21,000, the sum of Rs. 44,000, being accepted as the true consideration. In appealing the plaintiff pays a court-fee based on five times the revenue of the villages. Office suggests that as regards the two villages Pakariar and Cheontaha, in the case of which the sole question now at issue is the amount of consideration, the court fee should be paid ad valorem on the difference between the consideration claimed and that accepted by the lower Court. Both office and the learned vakil for the appellant rely on the Full Bench ruling in *Hafiz Ahmad v. Sobha Ram* (1). It is there laid down that when an appeal is preferred on the grounds that right to pre-empt has or has not been established, as the case may be, no matter what other pleas may be taken, the value of the subject-matter in dispute for the purposes of the Court-fees Act must be determined as provided in Cl. (vi), S. 7 of the Act. But were the question in appeal relates solely to the amount to be paid by the pre-emptor, there it should be calculated ad valorem on the difference between the amounts alleged as the sale price on the one side

1. (1884) 6 All 488 (F B).

and on the other. The appellant maintains that it is impossible to split up this appeal, that the whole consideration is one, and that the first part of this ruling must apply to the whole. Office on the other hand contend that the nature of the appeal is quite different as regards the villages Parkariar and Cheontaha, and that the appeal as regards them must be taxed as laid down in the second part of the ruling quoted. I think that office is right, but as there appears to be no clear ruling as to whether an appeal, which like this has two distinct parts with two different natures owing to the form of the decree of the lower Court, can be practically treated as two different appeals for court-fee purposes, I refer the question for your decision.

Judgment.—The facts are fully set out in the referring order of the Taxing Officer. The present appeal is divisible into two parts. In regard to the three villagers Rampur, Lachmipur and Jotepur, the suit has been dismissed and it has been held that the plaintiff has no right of pre-emption in these villages. In regard to Parkariar and Cheontaha the Court below has held that the right to pre-empt exists and it has directed the plaintiff to deposit the sum of Rs. 21,000 as the value thereof. The whole sale-deed purported to be for the sum of Rs. 44,000. The plaintiff sought to pre-empt the whole property upon the payment of Rs. 2,500. The Court below has held that Rs. 44,000 is the correct amount and in respect of the two villages Parkariar and Cheontaha it has directed the payment of a proportionate part, namely, the sum of Rs. 21,000. The appellant claims to be allowed to appeal on the payment of court-fee based upon five times the revenue of all five villages. The Taxing Officer's opinion is that the appeal being divisible into two parts and the sole question which arises in one part of the appeal respecting the two villages being a question of consideration, the appellant must pay an ad valorem court-fee as laid down in the ruling in *Hafiz Ahmad v. Sobha Ram* (1). In regard to the three remaining villages, as the right to pre-empt is in dispute, the court-fee in respect thereto must be calculated according to S. 7, Cl. (vi), Court-fees Act.

On behalf of the appellant it is urged that the question of consideration arises on the whole appeal and as that is not

the sole question, inasmuch as the right of pre-emption is in dispute in respect to at least three villages, under the ruling quoted he need only pay court-fees on five times the Government Revenue as mentioned above, on the whole estate. In my opinion the appeal is divisible into two clear and distinct parts and the report of the Taxing Officer is correct. In regard the two villages of Parkariar and Cheontaha, the court-fee will be calculated ad valorem on the difference between 21/44 of Rs. 2,500 and Rs. 21,000. The court-fees in respect of the other three villages will be calculated according to S. 7, Cl. (vi), on the basis of 5 times the Government Revenue. If the appellant so pleases he may amend his plaint of which notice will have to be given to the other side, and the office will calculate the court-fees after the amendment has been made. I allow three weeks for the making of the amendment and after it has been made, a necessary period will be allowed for the payment of any deficiency that may then be found due.

V.B./R.K.

Order accordingly.

A. I. R. 1918 Allahabad 233

RICHARDS, C. J.

Ram Samhart Tewari—Applicant.

v.

Rajman Naik and others—Opposite Parties.

Criminal Ref. No 118 of 1918, Decided on 26th February 1918, made by Sess. Judge, Gorakhpur.

Criminal P. C. (1898), S. 438—Acquittal—No appeal by Government but revision filed by complainant—Reference by Sessions Judge for re-trial to High Court—Re-opening held inadvisable due to long lapse of time.

Eleven persons were tried by a Magistrate of the First Class for offences under S. 147 read with S. 347, Penal Code and were acquitted on 14th December 1916. No appeal was preferred by the Government but the complainant filed a revision in the Court of the Sessions Judge who observing that the Magistrate had not said in what respect he considered the prosecution story to be exaggerated held that the case was one which should be re-tried and by his order of reference to the High Court dated 4th January 1918 recommended that the case should be re-tried:

Held: that as the Government did not appeal it was inadvisable to open up the matter again having regard to the long lapse of time between the order of acquittal and the order of reference. [P 234 C 1]

W. Wallach—for Opposite Party.

Facts.—Eleven persons were charged with and tried of offences under Ss. 147

and 347, Penal Code by a Magistrate, who came to the conclusion that the case against the accused was very doubtful one and that the prosecution story was exaggerated. He accordingly acquitted the accused on 14th December 1916. The Local Government did not appeal against the acquittal but the complainant filed a revision before the Sessions Judge. The latter observing that the Magistrate had failed to point out on what ground and in what respect he considered the prosecution evidence to be exaggerated rererred the case to the High Court by his order dated 4th January 1918, recommending that a re-trial should be ordered.

Judgment.—It appears that eleven persons were tried and acquitted for offences under S. 147 read with S. 347, I. P. C. The order of acquittal is dated as far back as 4th December 1916. Government did not appeal against the order of acquittal and I think having regard to the long lapse of time that it would be inadvisable to open up the matter now. I accordingly direct that the record be returned.

V.B./R.K.

Record returned.

A. I. R. 1918 Allahabad 234

RICHARDS, C. J. AND BANERJI, J.

Mt. Amtul Habib—Decree-holder—Appellant.

v.

Mahomad Yusuf — Judgment-debtor—Respondent.

Execution Second Appeal No. 1483 of 1916, Decided on 4th December 1917, against decree of Dist. Judge, Saharanpur, D/- 16th August 1916.

Execution—Decree—Interest ceases from date of deposit of portion—Interest.

Where in execution of a money decree a portion of the decretal amount is paid into Court interest ceases to run on such amount from the date of deposit. [P 234 C 2; P 235 C 1]

M. L. Agarwala and *S. M. Yusuf Hasan*—for Appellant.

Nihal Chand—for Respondent.

Judgment.—This is an appeal arising out of execution proceedings. A decree was obtained for dower for a sum of Rs. 5,000 with interest and costs, to be recovered from the estate of her deceased husband in the hands of the heirs. The decree holder sought to execute her decree and was met with an objection that she herself being one of the heirs and entitled to one-fourth of the estate the decree could only be executed for three-fourths

of the amount. When making this objection the judgment-debtors deposited three-fourths of the amount of the decree, principal, interest and costs. This objection was allowed in the Court of first instance. There was an appeal to the District Judge who held that the decree being for Rs. 5,000 it must be executed for that amount. The High Court upheld this ruling. The execution proceedings then continued, but the decree-holder claimed interest on the full amount of the decree up to 14th August 1915 that is until three months after the decision of the High Court. The judgment-debtors claimed that interest should not be charged save on the difference between the amount which they had deposited in Court and the full amount of the decree that is to say that they should be relieved from paying interest on so much as they had deposited from the date of the deposit. This contention found favour with both the Courts below. The decree holder comes here in second appeal.

The matter is not altogether free from difficulty. O. 24, Rr. 1, 2 and 3 provide that in the case of a suit the defendant may pay into Court such sum of money as he considers as satisfaction in full of the claim. Notice of the deposit is given to the plaintiff who is entitled to draw the money out whether he takes it in full discharge or not and no interest is allowed to the plaintiff upon the amount of the deposit. There is no corresponding provision as to payment out of Court and the cessation of interest in execution matters but there does not seem to be any reason why the same thing should not happen in execution proceedings as in the case of suits. In the present case the plaintiff had admittedly a decree which could be executed for at least the sum which had been deposited by the judgment-debtors. We think that there can be very little doubt that if the decree holder had asked the Court executing the decree and in which the money had been deposited to pay out this money at the same time stating that the taking of the money out was without prejudice to the question raised by the pending appeal the Court would have allowed the decree-holder to withdraw the money just as the Court would have allowed a plaintiff in a suit to withdraw money deposited by the defendant although the

plaintiff does not take it in full discharge. We are borne out in this view by a circumstance which happened in this very case. After the money had been deposited a third party who had a decree against the decree-holder attached a portion of the money which had been deposited in Court and the same was paid out without objection. To hold that the Court is not entitled to pay out to a decree-holder in part discharge of his claim in a case like the present would mean that the money deposited should lie in Court of no use to either party while all the time interest would be running up against the judgment-debtor in the event of the Court deciding that there was a greater liability on foot of the decree. Even the decree-holder would not profit because if the case was eventually decided against him he would not have had the benefit of the money which had been deposited by the judgement-debtor. We think that in this case we ought to apply the analogy of the rules which relate to payment into Court of money by the defendant in a suit and that in this view the decisions of the Courts below were correct and should be affirmed.

We accordingly dismiss the appeal with costs in all Courts including in this Court fees on the higher scale.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1918 Allahabad 235

PIGGOTT AND WALSH, J.J.

Hamid Hussain — Plaintiff—Appellant.

v.

Kubra Begam — Defendant—Respondent

Second Appeal No. 616 of 1916, Decided on 24th January 1918, from decree of Dist. Judge, Saharanpur.

Husband and wife—Restitution of conjugal rights—Parties found on bad terms—Husband suspecting wife's fidelity and bringing civil and criminal cases against her—Plaintiff is not entitled to decree.

In a suit for restitution of conjugal rights it appeared that the parties had been on bad terms for a considerable period, that the husband suspected the wife's fidelity and that he had been bringing civil and criminal cases against her:

Held: that the wife had reasonable grounds for believing that her health and safety would be endangered if she returned to her husband's custody and that the plaintiff was not therefore entitled to a decree. [P 237 O 2; P 238 O 1]

S. M. Sulaiman—for Appellant.

Tej Bahadur Sapru and *Kailas Nath Katju*—for Respondent.

Order—This was a suit for restitution of conjugal rights by a Mahomedan husband. It was decreed by the Court of first instance; but has been dismissed by the learned District Judge of Saharanpur in appeal, on the ground that the plaintiff "had treated his wife in such a way that he has lost all right to claim restitution of conjugal rights."

We are of opinion that the findings of fact recorded by the lower appellate Court are not specific enough to dispose of the suit. The principles of law applicable to a defence of "legal cruelty" raised in a case of this sort were laid down by their Lordships of the Privy Council in *Moonshai Buzloor Ruheem v. Shumsoonissa Begam* (1). We may refer also to two decisions of this Court, viz., *Husaini Begam v. Muhammad Rustom Ali Khan* (2) and *Khurshedi Begam v. Khursed Ali* (3). We remit the following issues for determination by the Court below, on the evidence already on the record: (i) Is it proved that the defendant has in the past been subjected to ill-treatment, physical or mental, by the plaintiff? The finding on this issue should be as specific as possible as regards time, circumstances and the nature of the ill-treatment found (ii) On the case as a whole, is the Court of opinion that the defendant has reasonable grounds for believing that her health and safety would be endangered if she returned to her husband's custody? Ten days will be allowed for objections after the return of findings. The lower appellate Court submitted the following:

Findings—The issues remitted here are: (1) Is it proved that the defendant has in the past been subjected to ill-treatment, physical or mental, by the plaintiff? (2) On the case as a whole, is the Court of opinion that the defendant has reasonable grounds for believing that her health and safety would be endangered if she returned to her husband's custody? The story which the defendant put forward in an application sent by her to the Collector of Muzaffarnagar and Saharanpur was that the plaintiff was really only her agent, but that by some cunning he had made himself out to be her husband; that he wanted her money and with the assistance of a vakil named Liaquat Husain tried to induce her to transfer her

1. (1866-67) 11 M I A 551 (P. C.).

2. (1907) 29 All 222.

3. A I R 1911 All 452=25 I C 213.

property to the plaintiff's name; and that when she refused to comply took her to Kasba Kairana and kept her a prisoner for 1½ years in the vakil's house, after pretending that he was taking her to Meerut to have false teeth made; that in order to extort property from her he prevented her relations from coming to her; that she was beaten by Liaqat Husain, and treated in a manner in which prisoners in jail are probably not treated. The result, she said, was that she suffered from facial paralysis and palpitation of the heart. She went on to say that plaintiff and Liaqat Husain compelled her by deception to transfer property in their favour, and had got her thumb impression on some paper. That the plaintiff told her that the house at Kairana was that of a robber and knifer. That Jawad Husain (son of the other defendant Zahid Husain) her sister's daughter's son came and called out her name. She ran to see him, but Liaqat Husain scolded his servants for letting him in. That Jawad Husain told her that the house (in which she was imprisoned) was Liaqat Husain's and not that of a robber, that Litqat Husain did not allow her to say anything more.

That plaintiff then took her from Kairana to Sarsena, and then from Sarsena to Kalear, where she was made to execute a sale deed in favour of the wife of one Ashiq Husain and register it before the Sub-Registrar. That this document was for Rs. 20,000 or Rs 21,000 of which Rs. 7,000 were paid before the Sub-Registrar. Of this plaintiff deposited Rs. 6,000 with the banker Jagmandar Das and kept Rs. 500 himself. Rs. 500 had been taken by him previously as earnest money. That plaintiff then put her in the train with his servant to take her back to Kairana. He did not however tell her where she was to go. When the train arrived at Saharanpur, she saw Jawad Husain on the platform, jumped out and embraced him, and asked him what station it was. On his telling her she went home with him. She said also that she had fever when she executed the sale deed and that in addition to the Rs. 7,000 above mentioned, plaintiff took from her her boxes containing ornaments to the value of Rupees 2,000. That plaintiff was a pauper, he used violence to her and robbed her of her money. Jawad Husain corroborates this story as far as his going to Kairana is

concerned, and says that he received a letter from the defendant complaining of ill treatment; he however met her at Saharanpur by chance Sabir Husain, who went with him to Kairana, also corroborated. Examined in Court, defendant added that when she was at Saharanpur with him (before she was taken to Kairana) plaintiff beat her very much, that sometimes she aches even now from the wounds. After marriage, he sometimes used to dine out, and was always quarrelling with her, and abusing her and her parents, saying that she was of loose behaviour, demanded money of her, sometimes Rs. 2,000 and sometimes Rs. 3,000.

She adds that she has transferred her property to Jawad Husain, her child, who is now owner of the property. When defendant took up her residence in Zahid Husain's house, plaintiff made an application to the Magistrate under S. 552, Criminal P. C. asking that the police should order the release of his wife. Then he brought a complaint under S. 498, I. P. C. against Zahid Husain saying that he had enticed her away and keeping her as his wife. The Joint Magistrate dismissed this on 18th March 1915, and it was absurd enough complaint, defendant is about 50 years of age, and is said to have lost all her teeth. Plaintiff then filed the present suit. The plaintiff's evidence shows him to be probably without property, although he says that property entered in Liaqat Husain's name belongs to him, he has had no residential house for ten years; Liaqat Husain is helping him in this suit by "money and advice," he now lives in Liaqat Husain's house. He admits having kept the defendant "aloof" so that no relations might carry her off. The plaintiff has called witnesses to prove that though they live close to where he lives, they never heard any sounds as if plaintiff was ill-treating the defendant. So far as direct evidence is concerned, the case is really one of taking the wife's word against the husband or vice versa.

The defendant's married life has been peculiar. In 1902, or 1903, she appears to have run away with one Diwan Shah. The plaintiff lodged a complaint under S. 522, and lost it. In 1904 he instituted a suit for restitution of conjugal rights and appears to have been supported in that suit by Zahid Husain, the present second

defendant. In her defence in the suit she totally denied having been married to the plaintiff, and further charged Zahid Husain with the intention of taking away her property in favour of his son. The suit was decreed, and as defendant declined to submit to the decree, she was put into jail for some months. She had sued the plaintiff unsuccessfully for dower, and had executed a deed of gift of all her property in favour of Diwan Shah. When she got out of jail and joined the plaintiff the latter caused her to bring a suit against Diwan Shah to cancel the deed of gift in his favour and for possession of her property. In this suit she was successful, and in 1906 she conferred upon the plaintiff the rights to manage her property though not to alienate it or raise money upon it. After that she seems to have lived with the plaintiff to outward appearance peacefully until the year 1914, when the execution of the sale deed of the 18th May was immediately followed by her leaving her husband.

According to the written statement in this case she has now transferred the whole of her property to Jawad Husain, but in her evidence she alleges that it is still hers. It is in Jawad Husain's name but she maintains that her son has no interest in it during her lifetime. Jawad Husain, of course, contends that according to the deed of gift he is owner of the house.

As I have intimated, both plaintiff and defendant are well stricken in years and it seems clear that the defendant is in the unfortunate position of a woman with property which is desired by a needy husband on the one hand and needy relations on the other. The learned Subordinate Judge thinks that plaintiff at one time beat her, but he says that any husband would do that to a wife whose fidelity he suspected. On the whole the evidence that plaintiff has ill-treated the defendant physically, except if it be an exception to this extent, is not satisfactory. When giving her evidence she alleged merely that he abused her, and the allegations in her written petitions appear hardly to be made out. That she has been ill-treated by him in other ways that is to say, mentally is however reasonably likely; he admits having prevented her relations from having access to her, he did not hesitate to keep her for

months in jail and she selected to stay in jail rather than return to him: and it is not likely that she voluntarily suffered him to deal with her property. Similarly there appears to be reasonable ground for supposing that her health and safety would be endangered if she were compelled to return to him. He and she are on the worst possible terms, and there can be no natural love or affection between them, and in his house she would be completely in his power. There is too much reason for supposing that the plaintiff's desire in pressing the suit is to get hold of defendant's property rather than to have her to live with him and as she has executed a deed disposing of this property it is more than likely that he would subject her to distress to induce her to cancel the deed in his favour. It is contended on plaintiff's behalf that defendant is really an unwilling tool in the hands of her relations and is being opposed by them. That is of course a possibility, but there is no evidence to enable me to say that it is in fact the case.

There is every reason to suppose that she left the plaintiff voluntarily and that so far at any rate she was in no way coerced by her relations. If she is ill treated by them in future, she will have only herself to thank. It seems to me that it could not be safe, having regard to all that has happened to order her to be delivered over to the plaintiff.

Judgment.— This was a suit by a Mahomedan husband for restitution of conjugal rights in which by our order of 8th August last, we thought it necessary to remit certain issues for more specific findings by the lower appellate Court. Those findings have now been returned and we are satisfied that they cannot be successfully assailed on the grounds taken in the petition of objections filed by the plaintiff-appellant. We desire to refer to case of *Armour v. Armour* (4) as laying down sound principles of law, which we accept and propose to apply to the facts found in this case by the learned District Judge. We think the findings of the learned District Judge proceed upon evidence and are not vitiated by any erroneous view of the law. We must accept his finding that the defendant has reasonable grounds for believing that her health and safety would be endangered if

she returned to her husband's custody and in our opinion this finding disposes of the appeal. We dismiss the appeal accordingly with costs.

V.B./R.K.

Appeal dismissed.

A. I. R. 1918 Allahabad 238 (1)

RICHARDS, C. J. AND BANERJI, J.
Kirpa Devi—Plaintiff—Appellant.

v.

Ram Chander Sarup—Defendant—Respondent.

First Appeal No. 42 of 1917, Decided on 7th November 1917, from order of Assistant Collector, First Class, Meerut, D/- 17th January 1917.

(a) *Agra Tenancy Act* (1901), S. 175—S. 175 applies to appeals whether to Civil or Revenue Court.

Section 175 applies to all appeals, whether they be appeals to the Revenue Court itself or to the civil Court. [P 238 C 2]

(b) *Agra Tenancy Act* (1901), S. 177—Order staying or refusing to stay suit under para. 18, Sch. 2, Civil P. C. is not decree and no appeal lies.

An order of a Revenue Court staying or refusing to stay a suit under para. 18, Sch. 2, Civil P. C. is not a "decree" within the meaning of S. 177 and no appeal therefore lies against such order to the civil Court. [P 238 C 2]

Surendra Nath Sen—for Appellant.

Nihal Chand—for Respondent.

Judgment.—This and the connected Appeal No. 18 of 1917 arise out of two suits which were instituted in the Revenue Court by the same plaintiff against the same defendant. The suits were suits for profits. The amounts in dispute were such that if decrees had been made appeals would have lain to the civil Court. During the pendency of the suits it is alleged that the matters in dispute were referred to arbitration. One of the suits was pending in Revenue Court at Meerut and the other suit was pending in the Revenue Court at Bulandshahr. An application was made by the defendant at Meerut to stay the suit pending the arbitration under Sch. 2, para. 18, Civil P. C. The Meerut Court granted a stay. An exactly similar application was made to the Bulandshahr Revenue Court. That Court took an exactly opposite view to that taken by the Meerut Court and refused to stay the suit. This was a most unfortunate situation for all concerned and will work great hardship and has prolonged a useless litigation. The plaintiff appealed against the decision of the Bulandshahr Court. The defendant raises a preliminary objection against the plaintiff's ap-

peal that no appeal lies. In the connected appeal an exactly similar preliminary objection is taken by the plaintiff. We think that the preliminary objection has force. S. 175, *Tenancy Act* expressly provides that no appeal shall lie from any decree or order passed by any Court under this Act except as thereafter provided. This section obviously applies to all appeals, whether they be appeals to the Revenue Court itself or to the Civil Court. S. 177, deals with appeals which lie to the Civil Court and a right of appeal is only given against a "decree", and then only in certain class of cases. No appeal is given against an order. It seems to us clear that neither the order staying the suit in the Revenue Court at Meerut nor the order refusing to stay the suit in Bulandshahr is a "decree" within the meaning of S. 177. It is contended on behalf of the appellant that S. 193, *Tenancy Act* incorporates the Civil Procedure Code, and in the present Civil Procedure Code it is provided that an appeal shall lie against an order staying or refusing to stay proceedings (Sch. 2 para. 18). We do not think that this argument has force. At most it would mean that by incorporating the Civil Procedure Code an appeal is given in the Revenue Court. It certainly cannot mean that an appeal is given to the civil Court. We have been invited to say whether or not an appeal lies in the Revenue Court. We do not think that this Court ought to take upon itself to decide this matter which is not before it; if we did decide the matter the Revenue Court would not be bound by our decision. The result is that we allow the preliminary objection and dismiss the appeal with costs, which will include court-fees on the higher scale.

V.B./R.K.

Appeal dismissed.

A. I. R. 1918 Allahabad 238 (2)

BANERJI, J.

Madho and another—Accused.

v.

Emperor—Opposite Party,

Criminal Revn. No. 576 of 1917, Decided on 13th August 1917, from order of Sess. Judge, Allahabad.

Pena Code (1860), S. 332—"In discharge of duty as such public servant" means in discharge of duty imposed by law in particular case—Constable purporting to act under order of Magistrate no longer in force asking

accused to give up lathis Accused refusing and assaulting cannot be convicted under S. 332.

The words "in the discharge of his duty as such public servant" in S. 332, I. P. C., mean in the discharge of a duty imposed by law on such public servant in the particular case. [P 239 C 2]

A constable purporting to act under an order of the District Magistrate which had ceased to have force asked the accused to give up their lathis.

The accused refused to do this and assaulted the constable;

Held: that the accused could not be convicted under S. 332, I. P. C., inasmuch as the constable was not acting in the discharge of his duty as a public servant. [P 240 C 1]

Peary Lal Banerji—for Accused.

Lalit Mohan Banerji—for the Crown.

Judgment.—The two applicants, Madho and Ramanand, have been convicted under S. 332, I. P. C., for having caused simple hurt to a constable named Ram Partit and each of them has been sentenced to nine months' rigorous imprisonment. They have also been bound down to keep the peace for one year under S. 106, Criminal P. C. The facts as found are these. The two men with a third man named Mataphal were returning from the Cantonment Magistrate's Court and when they were nearing pontoon bridge the constable Ram Partit, who was on duty, found that they were all armed with what the Magistrate calls formidable lathis. The constable inquired who they were and on being told that they were servants of a pragwal, he asked them to give up their lathis if they were not prepared to go to the thana. The men refused to surrender their lathis. The constable then told them that he would not allow them to proceed. Thereupon Madho attacked him with a lathi and struck him several times. Ram Partit rushed at Madho and seized him by the waist and the two grappled with each other. Ramanand then struck Ram Partit with his fists until another constable appeared on the scene. For this offence the two applicants have been convicted and sentenced as stated above.

It is contended that the conviction under S. 332, I. P. C., is illegal, inasmuch as the constable Ram Partit who was undoubtedly a public servant was not in the discharge of his duty as such public servant when hurt was caused to him. It appears that in August 1914, the District Magistrate of Allahabad issued an order (which appears to have been published in December 1914), to the effect that no pragwals or their servants should carry lathis within the Municipal limits of Allahabad or the

Cantonment or the riverside and that the police had instructions to seize any lathis or dandas found in the possession of pragwals or their servants. It is in pursuance of this order that the constable is said to have been acting. If the order was a legal order and was in force at the time when the occurrence in the present case took place the applicants have been rightly convicted. The only authority as far as I am aware (and I have not been referred to any other) under which the order could legally have been passed, is para. 3, S. 144 Criminal P. C., being an order issued to to the public generally and not to any individual. Under para. 5 of the same section no order passed under the section shall remain in force for more than two months from the making thereof, unless in certain cases the Local Government by notification in the official Gazette otherwise directs. If the order in the present case was made under S. 144, it ceased to have operation after the expiry of two months from the date of it. It has not been stated or shown on behalf of the Crown that this order was repeated at any subsequent time and therefore I must take it that it ceased to have force at the time when the offence in the present case was committed. In the case of *Queen-Empress v. Dalip* (1), which was in some respects similar to the present case, it was held that the words "in the discharge of his duty as such public servant" in S. 332, I. P. C., mean in the discharge of a duty imposed by law on such public servant in the particular case. If the order issued by the District Magistrate in August 1914 ceased to have effect after the expiry of two months from the date of issue, the constable in carrying out the order could not be said to have been acting in the discharge of the duty imposed by law on him. The learned Government pleader has referred to S. 23, Police Act (5 of 1861) and has contended that it was the duty of the constable to obey and carry out the order issued by the District Magistrate, no matter whether that order was justified by law or not.

The answer to this contention is afforded by the language of S. 23 itself, which provides that it shall be the duty of every police officer promptly to obey and execute all orders and warrants lawfully issued to him by any competent

authority. The word "lawfully" governs both "orders" and "warrants," so that an order which a subordinate police officer is bound to obey must be an order which was lawfully issued. If the order passed by the District Magistrate could not be lawfully issued by him, it was not the duty of the constable to obey that order. Therefore when he was carrying out that order he cannot be said to have been discharging his duty as a public servant. The case of *Queen-Empress v. Nand Kishore* (2) was referred to but that case seems to be distinguishable. In my opinion the constable in calling upon the accused to surrender their lathis was not acting in the discharge of his duty as a public servant and therefore the accused could not be legally convicted under S. 332, I. P. C. They were certainly guilty of causing simple hurt and were liable to conviction under S. 323, I. P. C.

Having regard to the character of the men who committed the assault on the constable and the necessity of having proper control over men of this class specially when they commit assaults on police constables who are entitled to protection, I think that a somewhat severe sentence was called for. The sentence of nine months' rigorous imprisonment is however unduly severe for a simple assault of this kind. I therefore alter the conviction from one under S. 332, to one under S. 323, I. P. C., and reduce the sentence to one of four (4) months, rigorous imprisonment. The order passed under S. 106, Criminal P. C., binding down the applicants to keep the peace will stand. The applicants must surrender to their bail and serve out the remainder of their sentence.

V B./R.K. *Conviction altered.*

2. (1892) A W N 1.

A. I. R 1918 Allahabad 240

RICHARDS, C. J. AND BANERJI, J.

Govind Ram and others—Defendants
—Appellants.

v.

Jwala Pershad and others—Plaintiffs—Respondants.

First Appeal No. 59 of 1917, Decided on 7th November 1917, from order of 1st Addl. Sub-Judge, Aligarh, D/- 12th March 1917.

Civil P. C. (1908), O. 40, R. 1—Suit on simple mortgage—No receiver can be appointed even pending appeal by mortgagor.

! In the case of a simple mortgage the mortgagor

is entitled to remain in possession of the mortgaged property until such time as that property is brought to sale in due course of law. In a suit on a simple mortgage, therefore, the Court has no power to appoint a Receiver during the pendency of an appeal from the preliminary decree. [P 240 C 2]

Panna Lal—for Appellants.

S. N. Sen—for Respondents.

Judgment.—This appeal arises under the following circumstances. A mortgage suit was brought and a preliminary decree obtained for sale of the property on 25th of September 1915. The plaintiffs were puisne incumbrancers and the prior incumbrancer (to whom a large sum was due) was also made a party. The decree directed that the plaintiffs were to discharge the prior incumbrancer within the time named in the decree and that thereupon they would be entitled to sell the property for the amount which they had to pay the prior incumbrancer as well as the amount due on their own mortgage. The mortgaged property seems to be shares in ginning factory. The plaintiffs did not pay the prior incumbrancer within the time allowed. They obtained one or more extension of time but even then they failed to pay off the prior incumbrancer. The plaintiffs have filed an appeal against the decree in this Court, alleging that they have been ordered to pay too much to the prior incumbrancer. This appeal is pending. In this state of facts an application was made to the Court below to appoint a Receiver. The Court below did appoint a Receiver, and it is against that order that the present appeal has been preferred. The Court in its order states that the security is not sufficient for the amount of the incumbrances and that the machinery is wearing out from use, and the learned Judge seems to have considered that these circumstances justified the appointment of a Receiver. In our opinion a Receiver could not have been appointed under the circumstances of the present case. A mortgagor, where the mortgage is a simple mortgage, is entitled to remain in possession of the mortgaged property until such time as that property has been brought to sale in due course of law. O. 40 R. 1, provides for the appointment of a Receiver by the Court.

It has enacted that where it appears to the Court to be just and convenient a Receiver may be appointed. Cl. 2 provides that nothing in the rule shall authorise

the Court to remove from the possession or custody of property any person whom any party to the suit has not a present right so to remove. It seems to us abundantly clear that neither the plaintiff nor the prior incumbrancer has any present right to remove the mortgagor from possession of the mortgaged property. Furthermore, the mortgaged property is only a fractional share, and the Receiver could only be put into receipt of the profits of the mortgaged share. He could not take upon himself the management of the factory. We allow the appeal, set aside the order of the Court below and dismiss the application for the appointment of a Receiver with costs in all Courts. If the Receiver has secured any profit, he must pay the money received by him to the appellants in respect of their share.

V.B./R.K. *Appeal allowed.*

***A. I. R. 1918 Allahabad 241**

TUDBALL AND ABDUL RAOOF, JJ.

Narain Das—Plaintiff—Appellant.

v.

Het Singh and others — Defendants — Respondents.

Second Appeal No. 1022 of 1916, Decided on 11th May 1918, from decree of Dist. Judge, Budaun.

* Specific Relief Act (1 of 1877), S. 9—Suit based upon title wrongly dealt with as suit for possession under S. 9 — Appeal lies against decision—Appellate Court should remand case for trial on merits.

Where a suit which is based upon title is wrongly dealt with by the trial Court as a suit under S. 9, an appeal lies against the decision of the trial Court. The appellate Court in such a case is not entitled to dismiss the suit in toto, but should send it back to the trial Court to be dealt with as a suit based upon title, to have the proper issues framed and to be decided on the merits.

[P 242 C 1, 2]

M. L. Agarwala—for Appellant.

Tej Bahadur Sapru—for Respondents.

Judgment.—This appeal arises out of a suit brought for possession of property and damages. The plaintiff in para. 1 of his plaint stated that Mt. Gulabo, defendant 2, was the zamindar and owner of 9 bighas and 19 biswas of land in a certain village, that she and her husband, defendant 1, mortgaged the same with possession to the plaintiff for a period of five years under a registered mortgage-deed for Rs. 600 on certain conditions, one of which was that the principal mortgage-money should be deposited in the month of Jeth before the property could

be redeemed. He went on to state that he, the plaintiff, obtained possession of the property and had it cultivated through his sub-tenants. In para. 2 of the plaint he stated that on 1st September 1915 the two principal defendants mentioned above ejected his sub-tenants, who were made pro forma defendants to the suit, and without paying the mortgage money unlawfully took possession of the property, and that they were still in such possession; that they had refused to deliver possession to the plaintiff or to pay him his mortgage money or to pay him the damages which he had suffered. He dated his cause of action as 1st September 1915, the date of the trespass. In para. 3 of his plaint he merely stated that he had impleaded the sub-tenants as pro forma defendants.

In para. 4 of the plaint he stated that the suit for the purposes of jurisdiction and payment of court-fees was valued at Rs. 600 the mortgage money, plus Rupees 114 the amount of damages, but with regard to the claim being under S. 9, Specific Relief Act, the court-fee had been paid on half the mortgage-money and the entire amount of damages, that the village was within the local limits of the jurisdiction of the Court, hence the suit was cognizable by the Court. The following reliefs were prayed for: (1) that the plaintiff's rights may be declared and the principal defendants may be dispossessed and the plaintiff as mortgagee may be put into possession of the 9 bighas 19 biswas of land numbered as below, situate in Mauza Bhursaya; (2) that Rs. 114 due on account of damages for 1323 Fasli may be awarded to the plaintiff as against the principal defendants; (3) the costs of the suit may be awarded; (4) that any other relief to which the plaintiff may be entitled may also be granted. It will be noticed that it is only in para. 4 of the plaint that the plaintiff mentions S. 9, Specific Relief Act, and he only mentions it to show why he paid court fees on half the mortgage money. In their defence the defendants urged that the claim was one based on title and, therefore could not be brought under S. 9, Specific Relief Act. They pointed out that the claim for damages along with that for possession could not be maintained under S. 9, Specific Relief Act. They then went on to deny the allegations of fact and raised other points in defence. When the case

came on for trial the learned vakil for the plaintiff amended the plaint by striking out in the first relief the words "the plaintiff's right may be declared," and retaining the following words:

"the principal defendants may be dispossessed and the plaintiff, as a mortgagee, may be put in possession of the 9 bighas and 19 biswas pukhta of land."

The claim for damages was allowed to remain. The learned Munsif thereupon treated the suit as a suit under S. 9, Specific Relief Act; held that the suit was not barred by limitation; held that no claim for damages could be joined with the suit claiming possession under S. 9, Specific Relief Act; dismissed the claim as to damages and gave the plaintiff a decree under S. 9 for possession of the property without going into the merits of the other defences at all. The defendants appealed to the District Judge. Objection was there taken that no appeal could lie in a suit brought under S. 9, Specific Relief Act. The Judge treated the suit as a suit based on title. He held it to be of that nature but instead of remanding it to the Court of first instance for decision on the merits, he held that in view of the decision of this Court in *Nazir Ahmad v. Abid Ali* (1), he was bound to dismiss the suit in toto. He accordingly dismissed it. There are two pleas raised before us in the alternative. The first is that the suit being a suit under S. 9, Specific Relief Act, no appeal lay to the Court below. The second is that if it was not such a suit, then the first Court ought to have remanded it to the Court of first instance for decision on the merits. The facts are as stated above. The first question before us is whether or not the suit as it stands is really a suit based on title, or is one under S. 9, Specific Relief Act. As pointed out above the only mention of S. 9, Specific Relief Act, is to be found in para. 4 of the plaint, and it was mentioned more as an excuse or an explanation of the amount of court-fees paid on the plaint.

Even after the amendment made, that is, after the striking out of the words "the plaintiff's right may be declared," it seems to us that the suit is clearly a suit based upon title and that in so holding the Court below was correct. There remains the point as to whether the lower appellate Court was justified, by the

ruling quoted above, in dismissing the suit in toto. We do not think that that ruling is any authority for the decision at which the lower appellate Court has arrived. In that case really what this Court decided was that the suit as brought was a suit based on title in which an appeal did lie to the lower appellate Court and that the lower appellate Court had rightly dismissed the suit on the merits. In the present case the suit being really a suit based upon title the Munsif wrongly dealt with it as a suit under S. 9, Specific Relief Act. The case ought to have been sent back to that Court to be dealt with as a suit based upon title, to have the proper issues framed and to be decided on the merits. We therefore, allow this appeal. We set aside the decree of the Court below, we direct that the record be sent back through the lower appellate Court to the Court of the learned Munsif, to be restored to its number upon the file and to be heard and decided according to law. The costs of this appeal will be costs in the cause and will abide the result.

V.B./R.K.

Appeal allowed.

A. I. R. 1918 Allahabad 242

RICHARDS, C. J. AND BANERJI, J.

Raghunandan Lal and others—Decree-holders—Appellants.

v.

Badan Singh and others—Judgment-Debtors—Respondents.

Execution First Appeal No. 307 of 1917, Decided on 7th January 1918, against the order of First Addl. Sub-Judge, Aligarh, D/- 27th April 1917.

Civil P. C. 5 of 1908). O. 21, R. 11 (2)—Application fulfilling requirements of R. 11—Application is good if copy of decree is subsequently filed and saves limitation—Limitation Act (9 of 1908), Art. 182.

Where an application under R. 11 (2), O. 21, fulfils all the requirements of R. 11 necessary for an application for sale of property mortgaged in execution of the mortgage-decree but is unaccompanied by a copy of the decree, which is filed subsequently, the application is in accordance with law and saves limitation.

[P 243 C 1]

Panna Lal—for Appellants.

A. H. C. Hamilton—for Respondents.

Judgment.—This appeal arises out of an application for execution of a mortgage decree. An application was made on 1st March 1916, and it is admitted that if this application was an application for execution "in accordance with law," the

present application is within time. The application was in writing and seems to have complied with all the provisions of O. 21, R. 11. It being an application for the sale of immovable property under a mortgage-decree, the provisions of Rr. 12, 13 and 14 do not apply. The application however was unaccompanied by an affidavit, a receipt of inspection of the Registration Office and copies of the khewat and decree. The Court granted time to the applicant to file these documents and all the documents were subsequently filed except a copy of the decree. This not being done, the application was struck off on 30th March 1916. The Court below held that under these circumstances the application could not be deemed an application "in accordance with law," and so time would run from the previous application for execution and the present application in such case was admittedly beyond time. It seems to us that the view taken by the Court below was not correct. No doubt under the provisions of O. 21, R. 11 (Cl. 3), the Court is entitled to require the applicant to produce a certified copy of the decree, and if the applicant does not do so the Court is entitled to reject the application; but the application in the present case when made fulfilled all the requirements of R. 11 necessary to an application for sale of property mortgaged in execution of the mortgaged decree.

It was only after the application had been presented that the Court made its order that the applicant should produce a certified copy of the decree. This being so, it seems to us that the application was "in accordance with law" and saved limitation. We allow the appeal, set aside the order of the Court below and remand the case to that Court with directions to re-admit the application and proceed to hear and determine the application according to law. As we think that the decree-holder ought to have had the necessary documents before the Court and that the present appeal is due to his carelessness, we direct the parties to pay their own costs of this appeal.

V.B./R.K.

*Appeal allowed.***A. I. R. 1918 Allahabad 243**

RICHARDS, C. J. AND BANERJI, J.

Tilak Ram—Applicant.

v.

Dalip Singh—Opposite Party.

Criminal Revn. No. 1022 of 1917, Decided on 25th January 1918, from order of Addl. Sess. Judge, Meerut, D/. 3rd November 1917.

Criminal P. C. (1898), S. 195—Sanction granted is given by Court which first grants it and not by Court which subsequently refuses to revoke it.

A sanction granted under S. 195 is "given" by the Court which first grants it, and not by the Court which subsequently refuses to revoke it. Hence the period of six months mentioned in S. 195, Cl. (6), for which the sanction is to remain in force, must be computed from the day on which it is "given" by the Court which first grants it, and not from the date of the refusal of a superior Court to revoke it. [P 244 C 1, 2]

A. H. C. Hamilton—for Applicant.*Nihal Chand*—for Opposite Party.

Judgment.—In this case it appears that sanction was granted to a litigant in the Revenue Court to prosecute the opposite party for alleged offence under S. 471 and other sections of the Penal Code. The sanction was granted on 1st November 1915 by an Assistant Collector. On 11th May 1916 this sanction was set aside on the technical ground that the Assistant Collector who had granted sanction had no jurisdiction to do so. The High Court held that the Additional District Judge was wrong and sent the case back, with the result that the Additional District Judge held that a *prima facie* case had been made out why the opposite party should be prosecuted and he accordingly refused the application to revoke the sanction given by the Assistant Collector. A considerable time had elapsed in the meantime and in July 1917 a criminal complaint was lodged. This was met with the objection that the sanction was out of date and that therefore the Court could not take cognizance of the offence. This objection found favour with the Court before which the complaint was filed but the Sessions Judge held that the sanction was still in force—whereupon the opposite party applied in revision to this Court. A learned Judge considering the matter of some importance has referred the question to a Bench of two Judges. S. 195, Criminal P. C., provides that no Court shall take cognizance of certain offences committed under certain circumstances

without the previous sanction therein referred to. Cl. (6) is as follows :

"Any sanction given or refused under this section may be revoked or granted by any authority to which the authority giving or refusing it is subordinate and no sanction shall remain in force for more than six months from the date on which it was given, provided that the High Court may for good cause shown extend the time."

In the present case the High Court has never been asked, nor has it granted any extension of time. The question which we have to decide is whether under the circumstances of the present case it can be said that the sanction was still in force. If we hold that the sanction was "given" on 1st November 1915 it is clearly long since out of date. On the other hand if we hold that the sanction was "given" after the case had gone back to the Additional District Judge and he had refused the application to revoke the sanction granted by the Assistant Collector, then the prosecution was begun within time. We think it is impossible to hold on the clear meaning of the words of Cl. (6), S. 195, that the sanction can possibly be said to have been "given" by the Additional District Judge. The application before him simply was an application to revoke sanction which had been previously granted and his order was to refuse to revoke that sanction. It may be said that the opposite party by taking proceedings can always use up the whole six months in applications to the Court and thus make the sanction of no avail. There are two answers to this. In the first place if a party to whom sanction has been given choose to take advantage of that sanction and lodges his complaint, then he will be able to continue the prosecution notwithstanding any applications that the other side may make. It is possible that the Court might stay the prosecution pending the decision of an application to revoke the sanction, but the prosecution would nevertheless have been begun within time. In the second place there is an express power given to the High Court to extend the time for good cause shown. Our attention has been called to two cases of the Madras High Court. In *In re Muthukudam Pillai* (1) a Bench of two Judges expressly held that the sanction in a case like the present is "given" by the Court who first granted it, and

not by the Court who subsequently refused to revoke the sanction. A different view was taken by a Bench of the same High Court in *Muthuswami Mudali v. Veeni Chetti* (2) and in a more recent case, *Public Prosecutor v. Raver Unithiri* (3). We prefer to follow the earlier ruling of two Judges. The result is that we allow the application set aside the order of the Sessions Judge and restore that of the Court of first instance.

V.B./R.K. *Application allowed.*

2. (1907) 30 Mad 382=6 Cr L J 102 (FB).

3. A I R 1914 Mad 50=15 Cr L J 409=24 I O 145.

A. I. R. 1918 Allahabad 244

KNOX, J.

Shyam Lal and others — Plaintiffs — Appellants.

v.

Ram Charan and others—Defendants—Respondents.

Second Appeal No. 1128 of 1917, Decided on 30th November 1917, against decision of Sub-Judge, Cawnpore, D/- 4th July 1917.

(a) Practice—Appeal—Evidence not commented upon does not prove that it was ignored.

The mere fact that a Court has not made any observation on a particular piece of evidence is not enough to show that the Court wholly ignored it. [P 245 C 1]

(b) Civil P. C. (5 of 1903), O. 13, R. 4—Document produced must be endorsed by Court whether proved or admitted—It cannot otherwise form part of record.

Where documentary evidence is produced in a case, the Judge is required by O. 13, R. 4, to endorse with his own hand a statement on each document that it is proved against or admitted by the person against whom it is used and until this is done the document should not be filed as part of the record. [P 245 C 1]

The mere production of a document and the handing it over to some officer of the Court to put it on the file is not sufficient. [P 245 C 1, 2]

K. N. Katju—for Appellants.

Judgment.—With reference to the three pleas taken in the memorandum of appeal in this case, the third may be at once omitted inasmuch as the lower appellate Court clearly says that it believes and acts upon the evidence given on behalf of the respondents. It cannot therefore be said that the decree is based purely upon conjecture. No argument has been addressed to me on the first plea. With regard to the second plea that the lower appellate Court has acted illegally in wholly ignoring and not considering the voluminous documentary evidence, consis-

1. (1903) 26 Mad 190=2 Weir 200.

ting of village papers and deeds which conclusively negative the theory of exchange, put forward by the defendants, merely because the Court has not made any observation upon this evidence, is not sufficient to satisfy me that the Court wholly ignored and did not consider it. The Court, as I said previously in this judgment, has believed and acted upon the evidence given by the respondents, and the finding is a finding of fact which must be accepted by this Court as final. I note that in this case the lower appellate Court has not taken care to observe the rules regarding the placing of evidence upon the record. The endorsements upon the documents appear to be as follows:—"Ex 12 admitted against defendants." S. 141, Civil P. C., 1882, directs that there shall be endorsed on every document which has been admitted in evidence in a suit certain particulars. One of those particulars is a statement of the documents having been admitted in evidence. At first sight those words may seem ambiguous; but the Privy Council in their letter dated 3rd March 1884, addressed to this High Court of Judicature explain the view they take of these words. They say that the Judge shall then endorse with his own hand a statement that it was proved against or admitted by, as the case may be the person against whom it was used.

The document shall then be filed as part of the record. These were the words used in the Code of 1877, repeated in the Code of 1882, and reproduced in the Code of 1908, under O. 13, R. 4. The Judge is required to endorse with his own hand a statement on each document that it was proved against or admitted by the person against whom it was used, and until this has been done the document is not to be filed as part of the record. This has not been done in the present case. The practice adopted by the learned Munsif is one which their Lordships of the Privy Council have characterized in *Sadik Husain Khan v. Hashim Ali Khan* (1) as being "illegal as well as slovenly and embarrassing." There is nothing in the present case to show that these documents marked exhibits were ever tendered in evidence and then proved against or admitted by the party against whom they were tendered. The mere production of a document and the handing it over to

some officer of the Court to put it on the file is not sufficient. There is no guarantee that such document has ever been shown to the opposite side as a document on which the producer intends to rely, and in some cases documents are produced and afterwards found so embarrassing for the party producing them that it is little wonder if he abstains from tendering and proving the said documents. Anyhow no Court should lay its doors open to the stigma of illegal, slovenly and embarrassing procedure. The appeal is dismissed.

V.B./R.K.

Appeal dismissed.

A. I. R. 1918 Allahabad 245

RICHARDS, C. J. AND TUDBALL, J.
Chiranji Lal and another—Plaintiffs
—Appellants.

v.

Behari Lal and others—Defendants—
Respondents.

Privy Council Appln. No. 3 of 1918,
Decided on 25th July 1918.

Civil P. C. (1908). S. 110—Cross-appeals to High Court—High Court affirming part of decree and reversing part—Leave cannot be granted in respect of part affirmed if no question of law is involved.

Plaintiff's suit was decreed in part by the trial Court. There were cross-appeals to the High Court and the latter dismissed the plaintiff's appeal and accepted that of the defendant. The plaintiff applied for and obtained leave to appeal to the Privy Council against the decree by which the defendant's appeal had been accepted. He then applied for leave to appeal against the decree by which his own appeal had been dismissed and the trial Court's decree had to that extent been confirmed:

Held: that no substantial question of law being involved in the case and the trial Court's decree having been confirmed, leave to appeal to the Privy Council could not be granted. [P 246 C 1]

B. E. O'Connor and Tej Bahadur Sapru,
—for Appellants.

S. M. Sulaiman, Baldev Ram Dave
and *Haribans Sahai*,—for Respondents.

Judgment.—This is an application for leave to appeal to His Majesty in Council. It appears that the Court below decided partly in favour of the plaintiff and partly against. Both parties appealed. In so far as the Court below decided in favour of the plaintiff, this Court set aside the decree of the Court of first instance and dismissed the plaintiff's suit. There has been an application to this Court for leave to appeal against this decree of the High Court and by our order this day delivered we have given the usual certificate. The present application is for leave to His

1. A I R 1916 P C 27=38 All 627=19 O O 192
=86 I O 104 (P O).

Majesty in Council against the decree of this Court which affirmed the decision of the Court below and dismissed the plaintiff's suit. It has been argued that inasmuch as both the appeals arose out of the same suit and that this Court did not affirm in its entirety the decree of the Court of first instance, leave should be granted to appeal to His Majesty. It seems to us that inasmuch as the decree, which it is sought to appeal against, confirms the decision of the Court immediately below this Court, we have no power to grant a certificate unless we can certify that the appeal involves some substantial question of law. In the present case we are unable to certify that any substantial question of law is involved and it was not contended that any such question was involved. The proposed respondents appear and oppose the application, contending that they ought not to be put to the expense of a second appeal unless the plaintiff is entitled to appeal as a matter of right. For the reasons stated above, we are unable to certify that the case fulfils the conditions prescribed by S. 110, Civil P. C., and we reject the application with costs.

V.B./R.K. *Application rejected.*

A. I. R. 1918 Allahabad 246

PIGGOTT AND WALSH, JJ.

Ram Baran Rai and others—Plaintiffs—Appellants.

v.

Har Sewak Dube and others—Defendants—Respondents.

Second Appeal No. 1145 of 1916, Decided on 20th February 1918.

Bengal Regulation (1806), S. 8—Mortgage by way of conditional sale—Foreclosure proceedings—Notice of service—Record of proceedings under Regulation cannot be accepted as proof of service.

In order to prove that the equity of redemption of mortgage by way of conditional sale has been extinguished by proceedings taken under S. 8, Regn. 17 of 1806, the mortgagee must establish that he caused the mortgagor or his legal representative to be served with a copy of his own written application for foreclosure and also with a notice or perwana under the seal and official signature of the District Judge, warning him that the mortgage would be finally foreclosed in the event of his failing to redeem within a period of one year. [P 246 C 2]

The records of the proceedings taken under the Regulation cannot be accepted as prima facie proof of the fact of service of notice. [P 246 C 2]

P. L. Banerji—for Appellants.

Haribans Sahai and Lakshmi Narain Tewari—for Respondents.

Judgment.—This was a suit in which the plaintiffs claim redemption of a mortgage by conditional sale effected on 27th December 1863. The plaintiffs are the son and the grandsons of the original mortgagor, and the defendants are the sons and grandsons of the original mortgagee. The fact of the mortgage is admitted, and we find that it was never pleaded that the said mortgage, if redeemable at all, was redeemable only for a larger sum than that tendered by the plaintiffs. The defendants however contended that the equity of redemption had been extinguished by reason of certain proceedings taken in the year 1876 by the mortgagee under S. 8, Regn. 17 of 1806. Both the Courts below have found in favour of the defendants on this point and have added a finding that the present suit is barred by limitation. This latter finding, as it stands is difficult to accept. The suit was one for redemption and was brought within the statutory period of limitation. Either the equity of redemption has been extinguished or it has not. Of course if it has been extinguished, the suit fails not by reason of any bar of limitation, but because the plaintiffs have failed to prove their cause of action, namely, a subsisting right to redeem. If on the other hand the equity of redemption has not been extinguished, the suit is obviously within time. The essential question for determination is whether the proceedings taken by the mortgagee in the year 1876 had the effect of extinguishing the equity of redemption. This must depend in the first instance upon whether the mortgagee caused the mortgagor, or his legal representative, to be served with a copy of his own written application for foreclosure and also with a notice or perwana under the seal and official signature of the District Judge, warning him that the mortgage would be finally foreclosed in the event of his failing to redeem within a period of one year.

The evidence by which it is sought to prove this fact consists of certain records of the proceedings of the Court of the District Judge of Gorakhpur. There is abundant authority to support the proposition that such records cannot be accepted as prima facie proof of the fact of service. It has been contended before us on behalf of the respondent that most of the decisions on the point were pronounced in cases in which the mortgagee had come

in Court asking for a decree for possession or a decree declaring his proprietary title after he had taken the requisite proceedings under Regn. 17 of 1806. There is however a Bench decision of this Court in which the same principles have been applied to a suit for redemption exactly on all fours with the suit now before us. We refer to the case of *Badal Ram v. Taj Ali* (1). We have been asked to reconsider the decision in that case; but we do not ourselves see any adequate reason to dissent from it, and in any case we prefer to follow it on the principle of stare decisis. The evidence relied upon by the learned District Judge, as proving that the equity of redemption was extinguished by reason of the proceedings taken in 1876 was not evidence which could be accepted as establishing the facts sought to be proved on behalf of the defendants, and the decision of the District Judge on this point is based upon an erroneous view of the law and is open to interference by this Court under S. 100, Civil P. C. We may note that the Bench case to which reference has already been made was also decided in second appeal. This consideration is sufficient to dispose of the present appeal. We set aside the decrees of both the Courts below and in lieu thereof we give the plaintiffs a decree for redemption to be drawn up in the form prescribed by O. 24, R. 7, Civil P. C., allowing redemption of the property in suit on payment of the sum of Rs. 393-1-0 (rupees three hundred and ninety three and anna one only) on account of principal and interest within three months from this date. The plaintiffs will be entitled to their costs in all three Courts.

V.B./R.K.

Decrees set aside.

1. (.907) 4 A L J 717.

A. I. R. 1918 Allahabad 247

TUDBALL, J.

Lachhmi Narain—Applicant.

v.

Bindraban—Opposite Party.

Criminal Revn. No. 1029 of 1917, Decided on 29th January 1918 from order of District Magistrate, Bareilly.

Criminal P. C. (1898) S. 195—Accused charging B under Penal Code, S. 406—Complaint dismissed—B applying for sanction to prosecute for perjury—Application dismissed—Accused bringing civil suit against B—While suit was pending B appealing to District Magistrate against order refusing sanction—District Magistrate dismissing ap-

peal temporarily till civil suit was decided and after its decision granting sanction—Order is illegal for there is no such thing as temporary dismissal of appeal.

Accused preferred a charge under S. 406, Penal Code, against one B which was dismissed. B then applied for sanction to prosecute accused for perjury, but that application was rejected. In the meantime accused brought a civil suit to recover the sum of money in respect of which he had preferred the charge in the criminal Court. That suit was pending, when B appealed to the District Magistrate against the order refusing sanction to prosecute. The latter dismissed the appeal till the decision of the civil suit, but after its determination granted the sanction:

Held: (1) that the order of the District Magistrate granting sanction was illegal, inasmuch as the Magistrate became functus officio when he passed his order dismissing the appeal, there being no such thing known to law as a temporary dismissal of an appeal.

(2) that the proper procedure for the District Magistrate would have been to have postponed the decision of the appeal till the decision of the civil suit.

(P 248 O 1)

Sital Prasad Ghosh—for Applicant.*M. L. Agarwala*—for Opposite Party.

Judgment.—The applicant in this case on 1st September 1916 preferred a charge under S. 406, I. P. C., against Bindraban in a criminal Court. He was given sufficient opportunity of producing preliminary evidence but he failed to do so and finally in the beginning of January the complaint was dismissed. He at once put in a fresh complaint and finally the case was tried by a Bench of Honorary Magistrates who dismissed it again in the presence of the accused. Bindraban then applied to the Bench for sanction to prosecute Lachhmi Narain for the offence of perjury. The Bench of Magistrates did not think it advisable to grant sanction and rejected the application. In the meantime Lachhmi Narain had brought a suit in the civil Court to recover the sum of money in respect of which he had preferred the charge in the criminal Court. That suit was pending when Bindraban appealed to the District Magistrate against the order of the Bench refusing sanction to prosecute. The District Magistrate wrote a strange order. It runs as follows:

"The appellant admits that the respondent has got a civil suit now pending to recover the money he alleges he paid to appellant, about which he filed his complaint, under S. 406, I. P. C., which was dismissed. It would be obviously improper to grant sanction to a prosecution for a false case at this stage. If when the civil suit is finished the appellant still thinks that he has good ground for asking for a prosecution, he can apply again to this Court for a revision of the lower

Court's order. Till that time this appeal stands dismissed."

On 14th September 1917, Bindraban again applied to the District Magistrate, the civil suit in the meantime having come to an end. It had been dismissed and he furnished the Court with copies of the judgments of the first Court and the appellate Court in that suit. Notice was issued by the District Magistrate to Lachhmi Narain and then the District Magistrate passed the following order:

"Having now seen the judgments of the lower and appellate civil Courts in this matter, in both of which Courts the respondent in this case entirely failed to substantiate his claim I think this is a proper case in which to grant sanction to prosecute, as apart from the personal enmities between the parties, the interest of the estate demands that such prosecutions, on biased and unreliable evidence, should be stopped. I set aside the order of the lower Court and grant the sanction asked for."

Lachhmi Narain has come to this Court in revision against this latter order. Such things as temporary dismissals of appeals are unknown to law and so far as the appeal is concerned, practically the District Magistrate was functus officio when he passed his order of 22nd September. His proper course would have been to have postponed the decision of the appeal until the decision of the civil suit. The case, however appears to be one in which some action might be taken as regards Lachhmi Narain and his witnesses but in which the prosecution should not be left in the hands of a private person, as it would simply be used as a weapon of extortion. I therefore allow this application and set aside the order of the District Magistrate of 22nd September 1917. I direct the record to be returned to the Magistrate with direction that, if he thinks fit, he may take up the case suo motu and issue notice and if necessary, direct the prosecution of Lachhmi Narain and his witnesses so as not to leave the prosecution in the hands of a private person. The District Magistrate will understand that I do not seek to fetter his discretion in any way.

V.B./R.K.

Order set aside.

A. I. R. 1918 Allahabad 248

RAFIQUE, J.

Devi Prasad—Applicant.

v.

J. A. H. Lewis—Opposite Party.

Civil Revn. No. 10 of 1917, Decided on 18th January 1918.

Provincial Insolvency Act (3 of 1907), S. 16 (2)—Income of insolvent can be appropriated for benefit of creditors—That amount must not be arbitrarily fixed.

Section 60, Civil P. C. read with S. 16, sub-S. (2), Provincial Insolvency Act, provides for an appropriation of the income of the insolvent for the benefit of his creditors and a Court has no jurisdiction to fix any arbitrary amount which can be thus appropriated. [P 249 C 1]

*Lalit Mohan Banerji—*for Applicant.

Judgment.—This is an application in revision by one of the creditors calling in question the order of the Court below dismissing his application made under S. 16 of Act 3 of 1907. It appears that the opposite party, J. A. H. Lewis, was declared an insolvent on 21st February 1910 by the Small Cause Court Judge of Cawnpur. No Receiver was appointed by the Court to take possession of the property of the insolvent. The reason probably was that there was hardly any property to be made over, only a few *mondhas*, I am told, were available at the time. The insolvent left Cawnpur soon after.

The applicant says that in 1916 when he went to Calcutta he learnt that the insolvent was employed in the Government Printing Press. On his return from Calcutta the applicant presented a petition to the Court of Small Causes, Cawnpur, on 15th April 1916, praying that half the pay of the insolvent be attached and realized for the benefit of the creditors. A notice seems to have been issued on the application, to which the insolvent replied by a letter to the Court dated 15th May 1916. In that letter he explained that he was a European, had a large family, was living in Calcutta and his pay was not sufficiently large to admit of half of it being attached. The learned Judge, without fixing a date for hearing and giving notice to the creditor, rejected the application on 20th May 1916, saying that the creditor was absent, the insolvent was an European and his pay was not large enough that half of it should be attached. The applicant went in appeal to the District Judge who upheld the order of the first Court. In his application for revision to this Court the applicant contends, and I think rightly, that the reasons given by the Courts below are no reasons at all for rejecting his application made under S. 16, Act 3 of 1907. When an appropriation of the income of an insolvent is made for

the benefit of the creditors, the Court usually acts on the principle of giving to the creditors the surplus after allowing sufficient portion of the income for proper maintenance of the insolvent according to his position in life. The Statute-Law, in this country, has however fixed this proportion by S. 60, Civil P. C., read with S. 16 sub-S. (2), Act 3 of 1907. There is no rule under which such an order as passed by the Courts below can be passed or upheld. I may here mention two cases which bear out the contention of the applicant, *Ram Chandra Neogi v. Shama Charn Bose* (1) and *Tulsi Lal v. H. Girsham* (2).

I therefore set aside the order of the Courts below and direct the Court of first instance to attach half the pay of the insolvent. Costs are allowed to the applicant.

V.B./R K. *Application allowed.*

1. (1913) 21 I C 950.

2. (1917) 38 I C 410.

A. I. R. 1918 Allahabad 249

TUDBALL AND ABDUL KAOOF, JJ.

Mata Badal Singh and another—Defendants—Appellants.

V.

Gourish Narain Singh and another—Plaintiffs—Respondents.

Second Appeal No. 961 of 1916, Decided on 7th June 1918, from decree of Dist. Judge, Benares.

Agra Tenancy Act (2 of 1901), S. 150—Holder of perpetual istimrari lease is proprietor and is entitled to resume muafi.

The holder of a perpetual istimrari lease of a village granted by the zemindar, by which the lessor transfers to the lessee all rights of all sorts in the village, reserving to himself only an annual sum payable as rent with the right to re-enter in case of default of payment, is a proprietor of the mahal within the meaning of S. 150, Agra Tenancy Act, and is entitled to resume a muafi comprised in the mahal.

[P 249 C 2; P 250 C 1]

*Gulzari Lal—*for Appellants.

*Gokul Prasad—*for Respondents.

Judgment.—This second appeal arises out of a suit brought for the resumption of a muafi khidmati. It has been decreed by both the Courts below. In the Court of first instance a plea was taken that the plaintiffs had no right to sue for resumption. That plea was decided in favour of the plaintiffs. The defendants appealed to the District Judge but in that appeal did not again raise this point. In this second appeal this point has again

been raised before us. For the decision thereof it is necessary to state a few facts. The zemindar of this village is His Highness the Maharaja of Benares. The plaintiffs are persons to whom a monthly payment in cash used to be made by His Highness as grant of some sort or other. They approached him and asked him to substitute for this grant in cash a grant of land which they might hold and possess and, if possible, develop and improve. Accordingly the Maharaja gave to the plaintiffs a perpetual istimrari lease of the village in question. He transferred to them all rights of all sorts reserving only to himself an annual sum payable as rent with the right to re-enter in case of default of payment by the plaintiffs. In the body of the lease there is specific mention of the muafi khidmati and other classes of muafi. By the terms of the deed the plaintiffs were given full powers over this land. The plea taken on behalf of the defendants is that under the terms of S. 150, Tenancy Act, the only person who can sue for resumption is the proprietor of a mahal or a portion of a mahal, that the proprietor is the Maharaja and the plaintiffs are not proprietors and therefore have no right to sue under this section.

The reply on behalf of the plaintiffs is that the Maharaja's rights under S. 150 as proprietor having been transferred to the plaintiffs, such a transfer is not illegal or contrary to law, and as that proprietary right now vests in the plaintiffs, they, in the circumstances of the present case, must be held to be proprietors of the muafi for the purposes of S. 150. There can be no doubt that the legislature in S. 150 used the word "proprietor" and not "land-holder," and it is highly probable that the legislature intended that the right to resume should be only in the proprietor and nobody else. We may assume this for the purposes of our decision. The question is whether in the circumstances of the present case this part of the proprietary right is vested in the plaintiffs or not by the terms of the lease. As we have mentioned above the lease is a perpetual one and all that the Maharaja reserved to himself was the right to receive an annual payment from the plaintiffs together with the right to re-enter in case of default. He clearly transferred to them all the other rights which go to

make up the bundle of rights which constitute proprietorship. We think therefore that in the circumstances of this case the plaintiffs, for the purposes of S. 150, must be deemed to be the proprietors of the mahal. It must not be taken for granted that we hold that this would be the case in every instance of a lease granted by a proprietor. The rights of a lessee are defined by the terms of the lease and in each case the Court will have to look to the terms of the deed and see what rights were vested in the lessee. The only other point which is raised in the case has no force and requires no discussion. The decree of the Court below is, in our opinion, correct. We dismiss this appeal with costs.

V B./R.K.

*Appeal dismissed.***A. I. R. 1918 Allahabad 250**

TUDBALL, J.

Nirbhay Lal and others—Plaintiffs—Appellants.

v.

Kallan and others—Defendants—Respondents.

Second Appeal No. 1211 of 1916, Decided on 28th January 1918, from decree of 1st Addl. Judge, Aligarh, D/- 3rd May 1916.

(a) Civil P. C (1908), S. 60 (f)—Decree on mortgage executed by agriculturist—House not appurtenance of holding is liable to be sold in execution of decree.

The house of an agriculturist is liable to sale in execution of a decree on foot of a mortgage made by him, when such house is not an appurtenance of his holding which he is forbidden by law to transfer. [P 251 C 2]

The manager of a Hindu joint family, which owned a house in a town and lived by cultivation of an occupancy holding, executed a mortgage of the house in favour of the plaintiff. The mortgagor died and the plaintiff brought a suit for the sale of the house against the remaining members of the joint family, who contended that as they and their ancestors were cultivators and the house in dispute was used in connexion with their cultivation, its hypothecation could not be valid according to law and no decree could be passed in respect thereto:

Held: that the house being situated in a town and there being nothing to show that it passed to the defendants as an appendage or adjunct of the tenure or that there was any connexion whatsoever between the two, it could not be held to be appurtenant to their occupancy holding. [P 251 C 2]

(b) Hindu Law—Debts—Coparcener—Antecedent debt incurred by brother in position of manager is not binding on coparceners unless incurred for family necessity.

In a joint Hindu family consisting of brothers and their families, an antecedent debt incurred by a brother in the position of a manager is not

binding upon his other coparceners, unless it can be shown to have been incurred for family necessity. It is not the pious duty of brothers or nephews to pay debts incurred by their brothers or uncles. [P 251 C 1]

Panna Lal—for Appellants.*Mohan Lal Sandal*—for Respondents.

Judgment.—This is a plaintiff's appeal. The suit was decreed by the Court of first instance. It was dismissed by the Court below. The facts are simple. There was a joint family of which the managing members were Kanhaiya and Ram Sarup. This family owned a house in the town of Rahu Pura in the District of Bulandshahar. The family lived by cultivation in the year 1905, being the owners of an occupancy tenure. On 31st July 1905 Kanhaiya and Ram Sarup executed a mortgage bond in favour of the plaintiffs for the sum of Rs. 200 and in that bond they mortgaged the house in the abovementioned town in which the family lived. Of the Rs. 200, Rs. 100 was paid in cash on behalf of the family to the landlord as rent due on the holding, the other Rs. 100 is entered in the bond as being an antecedent debt due from the family. The debt not having been paid, the suit was brought. The present defendants are the remaining members of the joint family, Kanhaiya and Ram Sarup having died. They denied the execution and the alleged consideration. They further pleaded that they and their ancestors were cultivators and that the house in dispute was used "in connexion with their cultivation," hence its hypothecation could not be valid according to law and no decree for sale could be passed in respect thereto. They further pleaded that the consideration of the bond had not been obtained for any family necessity such as was binding upon them. The Court of first instance held that the house was not an appurtenance to the holding.

It held the execution and consideration proved. It also held that the loan had been taken for family necessity. On appeal the Additional District Judge of Aligarh held that the execution was duly proved and also the consideration. He further held that Rs. 100 that had been paid to the zamindar as rent had been borrowed for family necessity, but there was no evidence to show that the other Rs. 100 had been taken for family necessity. He then went on to hold for certain reasons stated in his judgment that the house was an appurtenance to the

holding and that therefore it could not be mortgaged or sold, as the occupancy holding also could not be mortgaged or sold. The suit was brought in 1915, so no money decree could be passed. The Judge therefore dismissed the suit.

Two points are pleaded before me:

(1) that the evidence on the record accepted by the Court below taken in its entirety does not establish the fact that the house is appurtenant to the holding, and that its mortgage is perfectly a legal act and is binding upon the defendants. Next it is pleaded that the Rs. 100 which was an antecedent debt is binding upon the defendants simply because it was an antecedent debt. In regard to the latter point which I take first, little need be said. Kanhaiya and Ram Sarup were not the fathers of the present defendants. They were two out of four brothers who with their families formed the joint family. An antecedent debt incurred by a brother in the position of a manager is not binding upon his other coparceners unless it can be shown to have been incurred for family necessity. This is not the case of a father and sons. It is not the pious duty of one brother or of nephews to pay the debts incurred by brothers or uncles. In regard to the first point it is quite clear to my mind that the lower appellate Court is quite wrong. The judgment runs as follows:—

"The last question argued is whether the house is liable to sale or not. In order to decide this point, it is necessary to settle another question, as to whether the house is appurtenant to the occupancy holding of the defendants. Patwari Ganga Prasad, who was examined by the plaintiffs clearly states that the defendants own only one house, that is the house in suit. He also says '*Is men rihkar kheli karte hain*' (They live in it and cultivate land). Further on he deposes that their cattle, ploughs, etc., are also kept in this house. The defendants' witnesses also say that this is the only house in which the defendant resided and kept their cattle. All the plaintiffs' witnesses depose that the defendants are occupancy tenants and the Patwari says that the holding is 29 bighas odd in area. Under the circumstances I have no hesitation in holding that the house is appurtenant to the occupancy holding of the defendants".

I have no hesitation myself in holding that these circumstances in no way prove that the house is appurtenant to the holding and that the lower Court's deduction from these circumstances is erroneous and bad. The house in question is situated in a town. The defendants no doubt earn their livelihood by cultivating land. They must live in a house

just as other people who follow other professions live in houses. There is nothing to show that the house in question had any connexion in any way with the holding which the defendants occupy as tenants. A man may be a labourer to day and a cultivating tenant to-morrow. He may desert his tenure and follow a profession and may again take up a fresh tenure. There is nothing to show that this house passed to the defendants as an appendage or adjunct of the tenure or that there was any connexion whatsoever between the two. It is not even a house standing upon the holding. It is situated within the town. On these facts alone to hold that the house is an appurtenance to the holding is a very bad mistake in law. The Additional District Judge quotes from a ruling at p. 190, (A. L. J.) Vol. 8 [*Ramdial v. Narpal Singh* (1)], in the head note of which there is a remark that

"the dwelling house of an agriculturist may be deemed to be an appurtenance to his holding."

It seems to me that in every case it is a question of fact whether or not it is appurtenant to the holding. The question was considered in *Bhola Nath v. Kishori* (2), in which a majority of the Judges who constituted the Bench held that the house of an agriculturist is liable to sale in execution of a decree on foot of a mortgage made by him, when such house is not an appurtenance of his holding which he is forbidden by law to transfer. In the present case the lower Court has clearly made a distinct error. There is no evidence on the record to establish the fact that the house is appurtenant to the holding. In this view the appeal must be allowed, but only to the extent of Rs. 100 out of the principal of Rupees 200 secured by the bond. The plaintiffs will have a decree for Rs. 100 plus interest according to the terms of the bond from the date thereof up to the date fixed for payment by sale of the house in question. I allow six months from to day's date for payment. Future interest after the date of payment will be six per cent. simple. The parties will pay and recover costs in all Courts in proportion to success and failure. Costs in this Court will include fees on the higher scale.

V.B./R.K.

Appeal allowed.

1. (1911) 33 All 186=9 I O 931.
2. (1911) 34 All 25=11 I O 646.

A. I. R. 1918 Allahabad 252

PIGGOTT AND WALSH, JJ.

Jahangira—Defendant—Appellant.

v.

Karrar Husain—Plaintiff—Respondent.

Second Appeal No. 495 of 1916, Decided on 19th January 1918, from a decree of Dist. Judge, Meerut.

(a) **Agra Tenancy Act (1901), S. 10**—Defendant, joint-proprietor in mahal, mortgaging his *sir* and *khudkasht* lands to plaintiff and then entering into agreement to pay certain rent in respect of those lands—Assistant Collector accepting that rent as fair rent under S. 36, U. P. Land Revenue Act—Plaintiff suing for rent on basis of that agreement—Defendant is estopped from objecting that other cosharers should have joined in suit—It was competent to Assistant Collector to accept agreement of rent between parties—U. P. Land Revenue Act (1901), S. 36.

Defendant, a proprietor in a mahal, mortgaged his entire share, including his *sir* and *khudkasht* lands, to the plaintiff, and then entered into a contract of lease with the latter by which he undertook to hold the *sir* and *khudkasht* lands as tenant of the plaintiff and agreed to pay a certain rent therefor. The rent agreed upon between the parties was accepted by the Assistant Collector as a fair rent under S. 36, U. P. Land Revenue Act. The plaintiff sued for rent on the basis of that agreement and the defendant resisted the claim on the grounds: (1) that the right to sue vested in the entire body of cosharers in the mahal to which the lands in suit appertained, (2) that the agreement to pay a certain rent contravened the provisions of S. 10, Agra Tenancy Act:

Held: (1) that the defendant having admitted the plaintiff to have held the demised lands in severalty and having covenanted to occupy them as his tenant and to pay him rent therefor, it was not open to him to object that the other cosharers should have joined in the suit; (2) that it was competent to the Assistant Collector acting under S. 36, U. P. Land Revenue Act, to accept the agreement of rent come to between the parties. [P 253 C 1]

(b) **Agra Tenancy Act (1901), S. 10—S. 10 fixes maximum rent but there is nothing in it to prevent parties from contracting lower rent, provided it is accepted by Collector.**

Section 10 fixes a maximum rent and there is nothing to prevent the parties concerned from contracting for the payment of a lower rate, or from coming to an understanding amongst themselves as to what the prevailing rates of rent are and what advantages the ex-proprietary tenant is likely to get under the section. Such an agreement is not enforceable in itself and cannot be sued upon as it stands. What is wanted is an order under S. 10 (5) fixing the rent to be paid by the ex-proprietary tenant, but the law does not lay down that this order cannot lawfully be based upon an agreement come to by the parties, still less that in passing it the Collector must not take into account the terms of such an agreement. [P 253 C 2]

Bhagwati Shankar—for Appellant.

Sital Prasad Ghosh—for Respondent.

Piggott, J.—These are three connected appeals by a defendant in three connected suits for arrears of rent. It appears that the defendant, being a proprietor in a mahal, mortgaged his entire share with possession to the plaintiff. At the time of the mortgage the defendant was personally occupying certain plots of land in the mahal as his *sir* or *khudkasht*. The lands so occupied by him fell naturally into three classes. There were the *sir* lands strictly so called, there were *khudkasht* lands which the defendant had held for the full statutory period of 12 years, and to which therefore in law all the incidents of *sir* attached although they were not yet recorded as such, and finally there were *khudkasht* lands which the defendant had occupied for less than the statutory period. Having mortgaged his share with possession the defendant entered into a contract of lease with the plaintiff. By this contract he undertook to hold all the lands of each of the three descriptions referred to above as tenant of the plaintiff at a certain specified rent for each class of land. The present suit is to enforce the terms of that agreement. It has been resisted on a variety of grounds; but we are concerned only with the points raised by the petitions of appeal before us. One of the pleas taken is that the decrees of the lower appellate Court are not in accordance with the judgment inasmuch as the total sum decreed in favour of the plaintiff in the three decrees is in excess of the total of Rs. 165 awarded by the judgment. We have looked into this point and are satisfied that there is no force in it. The judgment clearly intended to award interest, at least up to the date of the institution of the suit, at the statutory rate of twelve per cent. per annum of the sum of Rs. 165, and this interest is sufficient to account for the difference between Rs. 165 and Rs. 196 1-0, which is the total of the three decrees, including interest to date. Two other points have been argued in this case: one is that the plaintiff is not entitled to sue at all, because the right to collect the rents of these lands is not vested in the plaintiff alone but in the entire body of cosharers in the mahal to which the lands in suit appertain. In our opinion the defendant is estopped from raising this plea. He

entered into a rent-agreement with the plaintiff in respect to these particular lands. If the plaintiff in enforcing his rights under that agreement is trenching on the rights of the other proprietors in the mahal, the latter have their remedy, either by way of a suit for settlement of accounts or by way of an application for partition. At any rate this defendant has admitted this plaintiff to have held these particular lands in severalty and has covenanted to occupy them as his tenant and to pay him rent therefor. The defence that other cosharers should have joined in this suit is not open to him.

The next point argued, although it is not easy to see how it is raised by any specific plea taken in the petition of appeal to this Court, has been that the rent agreement between the parties is unenforceable, being in contravention of the provisions of S. 10, Local Tenancy Act (No. 2 of 1901). This contention, of course affects two of the suits only, namely, those in which rent is claimed in respect of the *sir* and of the *khudkasht* of twelve year's standing or over. Under the provisions of S. 10 aforesaid the defendant became an ex-proprietary tenant of these lands and entitled to the privileges of such tenant. The law required that his rent should be fixed by the Collector under S. 36, N. W. P. and Oudh Land Revenue Act of 1901. When these appellants were first before this Court the facts were not as clear as they should have been made, but they are established now by the findings which have been returned on the issues remitted by this Court. It is certain that there was a proceeding purporting to be under S. 36 aforesaid, by which the rent payable by the defendant to the plaintiff for these particular lands was fixed at the amounts specified in the agreement come to by the parties themselves. There is nothing in law to prevent the Revenue Court from accepting such an agreement. No doubt it is the duty of the Revenue Courts—and the reported decisions of the Board of Revenue show that that duty is jealously performed—to see that the provisions of S. 10, Tenancy Act (No. 2 of 1901), are not evaded and that a reckless and improvident proprietor is not permitted to contract himself out of them. At the same time all that the law has said on this subject of rent is that the ex-proprietary tenant is entitled to hold at a

rate which shall be four annas in the rupee less than the rate generally payable by the non-occupancy tenants for lands of similar quality and with similar advantages in the neighbourhood.

To begin with, it is obvious enough that these provisions fix a maximum rent and there is nothing to prevent the parties concerned from contracting for the payment of a lower rate. Then again, there is nothing in law to prevent the parties from coming to an understanding amongst themselves as to what the prevailing rates of rent are and what advantages the ex-proprietary tenant is likely to get under the statutory provisions in question. They may come to a conclusion of their own as to what a fair rent, fixed with regard to the provisions of S. 10 aforesaid, is likely to be, and the law certainly does not forbid an agreement to pay the same. Such agreement is not enforceable in itself and could not be sued upon as it stands. What is wanted is an order under S. 10, Cl. 5 aforesaid, fixing the rent to be paid by the ex-proprietary tenant; but the law does not lay down that this order cannot lawfully be based upon an agreement come to by the parties, still less that in passing it the Collector must not take into account the terms of such an agreement. The contention before us, after the findings have been returned on the remanded issues, has been that the proceedings which terminated in the order fixing the rent under S. 36, Land Revenue Act, were irregular and that there was nothing to show that the question as to whether the agreement come to by the parties had given due effect to the provisions of S. 10, Tenancy Act, in favour of the exproprietary tenant, was present to the mind of the Collector or Assistant Collector and duly considered by him. On this there are two things to be said. One is that the presumption of law is in favour of validity and regularity in the proceedings of a Court of Justice, and not the contrary. We know that the Assistant Collector acted upon a report of the Tahsildar. That report is not before us; but there is no reason why we should presume that it did not contain an expression of the Tahsildar's opinion as to the suitability and propriety of the rent agreed upon between the parties. In the next place, it is at least open to argument whether in a suit like the present

the Court can enquire into the materials upon which the Collector or the Assistant Collector proceeded when he passed his order fixing the rent under S. 36, Land Revenue Act.

It so happens however that we are able to clinch this matter in the most satisfactory manner possible. The inquiry made under the orders of this Court shows that the rent agreed to be paid for the *sir* and *khudkasht* lands was a favourable rent and gave to the ex-proprietary tenant the full benefit of the statutory provisions. The Court below in inquiring into this point found that it was useless to take as exemplars the plots of land actually held by the few non-occupancy tenants (strictly so called) in this village, the fact being that all the best lands were included in the *sir* or *khudkasht*. It was inevitable therefore that the Court should inquire into the prevailing rates of rent paid for lands of similar quality and with similar advantages to those in suit, by a sub-tenant taking a lease of the same from the holder of the *sir* or the *khudkasht* rights. It has found that such lands are ordinarily let out for a rate of about Rs. 12 per pucca bigha and that the rent which the defendant covenanted to pay does not quite amount to Rs. 8 per pucca bigha. It is true that, when formally recording his finding on the issue remitted to him, the learned District Judge has expressed himself very clumsily and has fallen into what we have no reason to doubt is a clerical error. He says that the rent fixed on the defendant's *sir* and *khudkasht* land was "nearly equal" to that payable by other tenants for lands of similar quality and with similar advantages. If this finding be read in connexion with the reasoning on which it proceeds, it is fairly clear that the Court intended to find that the rent so fixed was nearly equal, after the deduction of the statutory 25 per cent. It may be that in the absence of a petition of objections we might have felt compelled to hold the parties bound by the finding as recorded, if the case had turned upon this single point, but the really decisive issue in the case is the issue 2 as to the order of the Assistant Collector fixing the rent. And when we are asked to consider whether there is any ground for presuming that in passing that order the Collector had overlooked the provisions

of S. 10, Tenancy Act, and had not allowed the ex proprietary tenant the advantages secured to him by that section, we are clearly entitled to take into consideration, not merely the finding actually recorded on issue 1, but the reasoning upon which that finding proceeds and the conclusions actually arrived at by the Court below on the evidence considered by it. The result is that there is really no force either in law or in equity in any of these appeals and we dismiss them accordingly with costs.

Walsh, J.—I agree.

By the Court.—The order of the Court is that this and the two connected appeals are dismissed with costs.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1918 Allahabad 254

RICHARDS, C. J. AND BANERJI, J.

Narsingh Das — Objector—Appellant.
v.

Debi Prasad — Decree-holder — Respondent.

Execution First Appeal No 278 of 1917. Decided on 10th January 1918, against order of Sub-Judge, Jaunpur, D/- 7th July 1917.

Limitation Act (9 of 1908), Art. 182—Decree directing ascertainment of mesne profits—Limitation for execution begins from date of ascertainment.

Where a decree directs an inquiry to be made as regards mesne profits, the date of the decree for the purposes of limitation, so far as it relates to mesne profits, is the date when the mesne profits are for the first time ascertained.

[P 255 O 1]

P. N. Banerji—for Appellant.

Gokul Prasad—for Respondent.

Judgment.—This appeal arises out of execution proceedings. The original suit was one for redemption, the plaintiffs alleging that they were entitled to possession of the property which had been mortgaged and mesne profits, on the ground that the mortgage had been discharged by the usufruct and surplus was due to the mortgagor. This suit resulted in a decree for possession and a direction for an inquiry as to what amount of mesne profits the plaintiffs were entitled to. The matter had been litigated up to the High Court and its decree was dated 2nd November 1904. In pursuance of the decree directing the inquiry as to mesne profits an application was made for that purpose in the year 1907 and the mesne profits were finally adjudicated upon in the year 1910. The decree was then put

into execution and various sums were realized from time to time. The present application for execution was made on 18th April 1917. This application was met with various objections. The objection insisted upon in this Court is that the decree which must be deemed as now executed is the decree of the High Court of 1904 and that accordingly its execution is barred either by the provisions of S. 230, Civil P. C., of 1882 or by S. 48 of the present Code. These two sections appear to be almost identical with one exception, namely, that S. 230 of the Code of 1882 speaks only of a decree for "payment of money," whilst the present Code speaks of decrees generally except as therein provided. The words of the present Code are:

"Where an application to execute a decree not being a decree granting an injunction has been made, no order for the execution of the same decree shall be made upon any fresh application presented after the expiration of twelve years from the date of the decree sought to be executed."

The argument put forward is that the date of the present decree was 2nd November 1904. If this contention be correct, the application was undoubtedly time barred and could not be granted. The matter is not now of any very general importance, because in future all decrees for mesne profits in a suit for recovery of immovable property must be made by the Court which grants the decree for possession of the property (the rules provide for making of a "preliminary" and a "final" decree). The contention put forward on behalf of the respondents is that the Court having directed an inquiry as to mesne profits there was no complete, or (to adopt an expression used by their Lordships of the Privy Council) there was no "operative," decree until the mesne profits were ascertained in the year 1910. This very point was considered by a Bench of this Court in the case of *Muhammad Umarjan Khan v. Zinat Begam* (1). The learned Judges in that case referred to the judgment of their Lordships of the Privy Council in *Radha Prasad Singh v. Lal Sahib Rai* (2) and also to Full Bench decision of the Calcutta High Court. We think that we ought to follow this case, which is in accordance with the practice which has been adopted by the new Civil Procedure

Code and which, moreover, seems to be in accordance with justice. Applying the principle laid down in these cases to the present, it must be deemed that the "date" of the decree so far as it related to mesne profits is the 15th February 1910, when the mesne profits were for the first time ascertained. Since that date there have been numerous applications for execution which have saved limitation and made the present application within time. On the general merits we have heard the parties and see no reason to differ from the view taken by the Court below. We dismiss the appeal with costs, including in this Court fees on the higher scale.

V.B./R K.

Appeal dismissed.

A. I. R. 1918 Allahabad 255

RICHARDS, C. J. AND BANERJI, J.
Naulakhi Kuar and others — Defendants—Appellants.

v.

Jai Kishen Singh—Plaintiff—Respondent.

Second Appeal No. 710 of 1916, Decided on 20th April 1918, from decree of Dist. Judge, Azamgarh.

(a) Grant—Construction — "Malik" indicates absolute estate.

A grant should be construed rather in favour of the grantee than in favour of the grantor.

[P 256 C 1]

In a deed of grant the use of the word "malik" alone, unless there is something definite to the contrary in the surrounding circumstances to qualify the meaning of the expression, indicates an absolute estate.

[P 256 C 1]

(b) Hindu Law — Gift to female—Donee described as "malik" mustaqil — Donee held took absolute estate.

In a deed of gift by a Hindu in favour of a lady the donee was described as "malik mustaqil." There were no surrounding circumstances to indicate that the donor wished the donee to take a mere life-estate.

Held: that the donee took an absolute estate under the deed of gift

[P 256 C 1]

S. N. Gupta for Surendra Nath Sen — for Appellants.

Lalit Mohan Banerji, Tej Bahadur Sopru and J. M. Banerji — for Respondent.

Judgment—This appeal arises out of a suit brought by the plaintiff for a declaration of his title to certain property. On the findings the only question which is open to consideration is whether or not Mt. Naulakhi Kunwar took an absolute estate under a deed of gift executed by one Dirgaj Singh. The Court of first instance dismissed the plaintiff's

1. (1903) 25 All 885.

2. (1891) 13 All 58=17 I A 150 (P O).

suit. The lower appellate Court held that on the true construction of the deed of gift, the lady took only a life-estate. Under the terms of the deed the lady is made absolute owner. The words used are "malik mustaqil." Their Lordships of the Privy Council held in the case of *Surajmani v. Rabi Nath Ojha* (1) that the word "malik" alone, unless there were something definite to the contrary in the surrounding circumstances to qualify the meaning of the expression, indicates an absolute estate. Here we have the word "malik" followed by the word "mustaqil," which even makes it stronger. The learned District Judge seems to have treated Dirgaj Singh as if he had been a pardanashin lady. He says that Dirgaj Singh may not have been aware of the meaning of the expression malik mustaqil. We cannot agree with this line of reasoning. The grant should be construed rather in favour of the grantee than of the grantor. Admittedly Diagaj Singh had sufficient estate in him to enable him to make a full grant to the Musammat. There are absolutely no surrounding circumstances to indicate that the donor wished the lady to take a mere life-estate.

He does not say in the deed that she is to have it only for her life, nor does he even say that she is to have no power of alienation. We think that the learned District Judge was wrong in the view that he took of the construction of the deed of gift. The result is that we allow the appeal, set aside the decree of the lower appellate Court and restore the decree of the Court of first instance with costs in all Courts.

V.B./R.K. *Appeal allowed.*

1. (1908) 30 All 84=35 I A 17 (P C).

A. I. R. 1918 Allahabad 256

RAFIQUE, J.

Labhu and others—Defendants—Appellants.

v.

Radha Charan—Plaintiff—Respondent.

Second Appeal No. 423 of 1917, Decided on 16th January 1918, from decree of Dist. Judge, Cawnpore, D/- 29th March 1917.

U. P. Land Revenue Act Ss. 111 and 112—Suit for partition—Objection by persons not recorded as cosharers—Decision in favour of objectors—Ss. 111 and 112 have

no application—No appeal lay to District Judge.

In a partition suit of certain land, trees and wells, the defendants objected to the partition on the ground that when their ancestors sold the village, they reserved to themselves and their heirs the said land, etc. The Assistant Collector decided in favour of the objectors, overruling the plaintiff's plea that defendants not being recorded cosharers had no locus standi to object to the partition. The plaintiff preferred an appeal to the District Judge, who allowed it on the ground that the objectors not being recorded cosharers could not object under S. 111 :

Held : that the defendants not being recorded cosharers, Ss. 111 and 112 had no application to the case and that no appeal therefore lay to the District Judge. [P 256 C 2]

K. N. Laghate—for Appellants.

Iqbal Ahmad—for Respondent.

Judgment.—Radha Charan applied to the Revenue Court for partition and notices were accordingly issued on his application. Labhu and others objected to the partition of some land, trees, wells, etc., on the ground that when their ancestors sold the village to the ancestor of the applicant the vendors reserved to themselves and their heirs the said lands, trees, wells, etc., free of revenue. The applicant met the objection by raising various pleas, one of which was that the objectors not being recorded cosharers had no locus standi. The Assistant Collector disallowed the plea and proceeded with the application for partition and the consideration of the merits of the objection under Cl. 3, S. 111, Land Revenue Act. He decided in favour of the objectors. Radha Charan preferred an appeal to the Court of the District Judge, who allowed the appeal on the ground that the objectors not being recorded cosharers could not be heard. The objectors have come up in appeal to this Court and contend that no appeal lay to the District Judge, inasmuch as on the plea of the applicant they, the objectors, were not recorded cosharers and could not object under S. 111, Land Revenue Act; the appeal should have been preferred to the Collector or the Commissioner under the other provisions of the Land Revenue Act. In support of this contention they rely on the following cases, *Habib Ullah v. Kushimba* (1) and *Tota Ram v. Mt. Sahodra* (2). Both these cases bear out the contention of the appellants. I therefore allow the

1 (1906) 3 A L J 481.

2 (1909) 2 I C 988.

appeal and set aside the lower Court's order and direct that the memorandum of appeal be returned to the respondent to be presented to the proper Court. Costs are allowed to the appellant.

V.B./R.K.

Appeal allowed.

A. I. R. 1918 Allahabad 257

PIGGOTT, J.

Indar and others—Applicants.

v.

Emperor—Opposite Party.

Criminal Revn. No. 795 of 1917, Decided on 2nd February 1918, from order of Dist. Magistrate, Farrukhabad.

(a) Criminal P. C. (1898), S. 110 (f)—Allegation that person committed certain offence must be proved by relevant evidence—Evidence of general repute will not suffice.

Where it is alleged against a person, even in a proceeding under S. 110, Criminal P. C., that he on a certain occasion, committed a particular offence, that fact must be proved by relevant evidence. It is not at all the same thing as proving by evidence of general repute that a man is a habitual offender. [P 257 C 2]

(b) Criminal P. C. (1898), S. 117—Fact that person is desperate and dangerous cannot be proved by evidence of general repute.

The fact that a person is so desperate and dangerous as to render his being at large without security hazardous to the community is not one which can, under S. 117, Criminal P. C., be proved by evidence of general repute. [P 257 C 2]

A. H. C. Hamilton—for Applicants.

R. Malcomson—for the Crown.

Judgment.—In this case Indar, Jhabbu Lal and Bhopal, a father and two sons, have been required by a Sub-Divisional Magistrate to give security to be of good behaviour for a period of one year under the provisions of S. 110, Criminal P. C. An appeal against that order has been dismissed by the District Magistrate. The case is before me on an application for revision in respect of these two orders. I have been through the record and I am quite satisfied that the orders complained of are illegal, on more than one ground, and cannot be affirmed. The order of the District Magistrate is perfectly clear and straightforward and shows beyond possible doubt the grounds upon which the prosecution of these men for bad livelihood has proceeded and the order against them passed. There was a dacoity at the house of one Ram Dayal, in the course of which the said Ram Dayal was murdered. Information was forthcoming to the effect that this dacoity had been organized by Indar, and that he and his sons, Jhabbu Lal and Bhopal, had

taken part in it. The three men were placed on their trial along with others, charged with having taken part in this dacoity and in the murder of Ram Dayal. They were acquitted by the Sessions Court.

The present proceedings are an attempt to prove by hearsay evidence what the prosecution were unable to prove by direct evidence at the Sessions trial. The learned District Magistrate says quite frankly that he is satisfied by the evidence on the record that Indar, Bhopal and Jhabbu Lal had got up the dacoity at the house of Ram Dayal. There is practically no legal evidence to this effect on the record. If it is alleged against a person, even in a proceeding under S. 110, Criminal P. C., that he on a certain occasion committed a particular offence, that fact must be proved by relevant evidence. It is not at all the same thing as proving by evidence of general repute that a man is a habitual offender. Moreover, in the present case the preliminary order drawn up by the Magistrate shows clearly that the prosecution were not prepared to undertake to prove by evidence of general repute or otherwise, that these men were habitual robbers or habitual receivers of stolen property. The case against them was that they were so desperate and dangerous as to render their being allowed without security hazardous to the community. This is not a fact which under S. 117, Criminal P. C., can be proved by evidence of general repute. I do not say that in a proceeding of this sort evidence of general repute may not be offered in support of an allegation that a person against whom proceedings have been taken is habitually a robber or habitually commits extortion, and that the Court may not be asked at the same time to consider whether this evidence of the man's general repute, read in connexion with direct evidence establishing definite facts against him, may not justify a conclusion that he is a desperate and dangerous character and within the scope of Cl. (f), S. 110, Criminal P. C.

If however it is intended to conduct a prosecution on these lines, the accused should have fair notice of the fact in the preliminary order drawn up against him. The form of the preliminary order passed in this case clearly shows that those responsible for the conduct of the prosecution were not prepared to ask the Court

to find that these men were habitual robbers or habitual receivers of stolen property. For all these reasons I am quite satisfied that the orders complained of cannot be sustained. I set aside the order of the Sub-Divisional Magistrate and discharge Indar, Bhopal and Jhabbu Lal. If they have furnished the securities required, their sureties will be discharged and their own recognizances cancelled. If they are in custody for failure to furnish security, they must be at once released.

V.B./R.K.

*Order set aside.***A. I. R. 1918 Allahabad 258 (1)**

BANERJI, J.

Muhammad Said—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 271 of 1918, Decided on 31st May 1918, from order of Magistrate, First Class, Cawnpore.

(a) Motor Vehicles Act (8 of 1914), S. 11—U. P. Government Rules R. 12, Cl. (1), Lamp on each side of front portion of vehicle is required.

All that R. 12 of the rules framed by the U. P. Government under S. 11, Motor Vehicles Act requires is that there must be affixed on each side of the front portion of the vehicle a lamp showing a white light in front. The words "front portion" in Cl. (a) of the rule must be read as contradistinguished from the rear and the back of the vehicle mentioned in Cl. (b).

[P 258 C 2]

(b) Motor Vehicles Act (8 of 1914), S. 11—U. P. Government Rules, R. 12, Cl. 1—"Front portion" of vehicle—Meaning of.

The "front portion" of the vehicle does not mean the extreme end of the bonnet or the extreme end of the front portion. The front portion is the portion which is outside the seats and the steering wheel.

[P 258 C 2]

*G. W. Dillon—for Applicant.**R. Malcomson—for the Crown.*

Judgment.—The applicant Muhammad Said has been convicted under S. 16 of Act No. 8 of 1914, Motor Vehicles Act 1914. The charge against him was that he had violated R. 12 of the rules framed by the Local Government under S. 11 of the Act. The case for the prosecution, as stated by the learned Magistrate who tried the case was that there were no "head lights" on the car. The Magistrate was of opinion that R. 2, Cl. (1) of the rules framed by the Local Government refers to "head lights" only, and that as the "head lights" in the case of the car of the accused were not lighted, he was guilty of a breach of R. 12, (Cl. 1). R. 12 provides that no person shall drive a motor vehicle during the period commencing half an

hour after sunset and ending half an hour before sunrise unless such vehicle is provided with lights as follows:

(1) in the case of vehicles other than motorcycles; (a) one lamp showing a white light in front affixed on each side of the front portion of the vehicle; (b) one lamp showing a red light at the rear and showing a white light at the side fixed at the back of the vehicle in such manner as to illuminate with the white light and render easily distinguishable the signs and numbers on the plates. There is no mention of head-lights in this rule and all that the rule requires is that there must be affixed on each side of the front portion of the vehicle a lamp showing a white light in front. The words "front portion" in Cl. (a) must be read as contradistinguished from the rear and the back of the vehicle mentioned in Cl. (b). The "front portion" does not, in my opinion, mean, as the learned Magistrate seems to think, the extreme end of the bonnet or the extreme end of the front portion. The front portion is the portion which is outside the seats and the steering wheel. There must be one lamp showing a white light in front affixed on each side of the front portion of the vehicle. If this is done, the rule in my opinion is completely complied with. The rule does not require the fixing of more than three lamps to each car, namely, two in front one on each side of the front portion and one at the rear. It would be stretching language to say that lamps fixed beyond the bonnet would be lamps affixed on each side of the front portion of the vehicle. The view taken by the learned Magistrate is in my opinion erroneous. The accused admittedly had two lamps affixed on each side of the front portion of his car showing a white light in front. Therefore he complied with the rule and did not commit a breach of it. I allow the application set aside the conviction and sentence and direct that the fine, if paid, be refunded.

V.B./R.K.

*Application allowed.***A. I. R. 1918 Allahabad 258 (2)**

BANERJI, J.

Liaqat Husain and others—Applicants.

v.

Emperor—Opposite Party.

Criminal Revn. No. 850 of 1917, Decided on 13th December 1917, from order of Session Judge, Aligarh, D/- 15th September 1917.

Criminal P. C. (1898), S. 203—Application to set aside order of dismissal under S. 203—Notice to accused is not necessary.

Where an order is made to the prejudice of an accused person, it is desirable that he should be afforded an opportunity of showing cause against the making of the order. [P 259 C 1]

But where the accused person was not called upon to appear in the Court below in the first instance and where an order was only made under S. 203, the issue of a notice by the Session Judge before setting aside the order of dismissal and directing the case to be tried by another Magistrate is unnecessary. [P 259 C 1, 2]

C. Dillon and C. R. Alston—for Applicants.

G. P. Boys, G. W. Dillon and J. M. Banerji—for the Crown.

Judgment.—The applicants in this case were charged before a Magistrate of the First Class under Ss. 342, 323 and 454, I. P. C., by one Ganga Sahai, who filed a petition of complaint in the Court of a Magistrate of the First Class. The Magistrate apparently after examining the complainant ordered an inquiry under S. 202, Criminal P. C., by a Magistrate of the Third Class. A report was made by that Magistrate and as a result of that report the complaint was dismissed under S. 203 without issuing any notice to the persons against whom the complaint was made. Upon application made to the learned Sessions Judge, he set aside the order of dismissal and directed that the case should be tried by another Magistrate. Before making his order he did not issue notice to the accused persons to show cause why the order of dismissal should not be set aside. By reason of this omission the present application for revision has been made, and the only contention put forward on behalf of the applicants is that the Court ought to have issued notice to them and for not having done so, its order ought to be set aside. It is conceded that the order of the learned Session Judge is not illegal by reason of his omission to issue notice, but it is urged that as the order was to the prejudice of the applicants, notice ought to have been issued. No doubt it has been held in this Court that when an order is made to the prejudice of an accused person it is desirable that he should be afforded an opportunity of showing cause against the making of the order, but this rule has been held to have certain limitations. Where the accused person was not called upon to appear in the

Court below in the first instance and where an order was only made under S. 203, the issue of a notice was unnecessary. This was held by Tudball, J., in *Angan v. Ram Pirbhan* (1). The learned Judge observed:

"In my opinion a notice to a person against whom a complaint is made is quite unnecessary where it is sought to set aside the summary order in a proceeding to which he was actually no party,"

and he held that the cases in which a notice was necessary before an order could be made to the prejudice of an accused person, were cases in which after an accused person was tried and discharged a further inquiry was ordered behind his back and without notice to him. A similar view was held in the Calcutta High Court by certain of the Judges who decided the case of *Hari Dass Sanyal v. Saritulla* (2). In the course of his judgment Prinsep, J., observed:

"A notice certainly would not be necessary before an order to set aside an order of dismissal under S. 203 could be passed, since that order was not passed with a notice to the accused person or in his presence and therefore is probably unknown to him."

The learned Chief Justice made remarks to the same effect at p. 617. In view of these authorities, from which I see no reason to differ, I do not think that this application is sustainable and that notice was necessary. I accordingly reject the application and discharge the order staying proceedings.

V.B./R.K. *Application rejected.*

1. (1913) 35 All 78=18 I O 146=14 Cr L J 2.
2. (1888) 15 Cal 608 (F B).

A. I. R 1918 Allahabad 259

RICHARDS, C. J. AND TUDBALL, J.
Chabraj Singh and others—Plaintiffs
—Appellants.

v.

Mahesh Narain Singh and others—
Defendants—Respondents

Second Appeal No. 1629 of 1917, Decided on 19th April 1918, from decree of Sub-Judge, Jaunpur.

Pre-emption—Suit for—Vendee becoming co-sharer by purchase before institution of suit—Second sale not pre-empted—Suit to pre-empt prior sale should be dismissed.

In a pre-emption suit it appeared that subsequently to the sale sought to be pre-empted but before the institution of the suit, the vendee had purchased some other land in the village and that no suit had been brought in respect of the subsequent sale in favour of the vendee;

Held: that the vendee became a cosharer in the village from the date of his subsequent purchase and that therefore the plaintiff's suit to pre-empt the prior sale was liable to be dismissed. [P 260 C 1]

Akhilnath Sanyal—for Appellants.

Judgment—It appears from the finding of the Court below that the vendee had become a cosharer by purchase on 27th November 1913, that is to say, before the present suit was instituted. No suit for pre-emption was ever instituted in respect of this second purchase. The result is that not only on the day upon which the Court of first instance might have made its decree in favour of the plaintiff, but even before the institution of the suit, the defendant-vendee had become a cosharer. It may be unfortunate that this matter was not gone into by the Court in the first instance, which might have had the effect of giving the plaintiff express notice of the sale of 27th November 1913 (which the learned vakil says he was ignorant of). This may have been an unfortunate circumstance for the plaintiff and a lucky one for the defendant vendee; but the fact remains that when the case was tried, the vendee was able to prove that he was a cosharer with the vendor before the date of the institution of the suit. In this view the decree of the Court below was correct. We dismiss the appeal.

V B / R.K. *Appeal dismissed.*

A. I. R. 1918 Allahabad 260

PIGGOTT, J.

Kallu—Applicant.

v.

Sital—Opposite Party.

Criminal Revn. No 728 of 1917, Decided on 5th January 1917, against order of Sess. Judge, Allahabad, D/- 9th July 1917.

(a) Penal Code (1860), S. 499—**Excep. 1—Statement to come under exception must be true in fact.**

A statement in order to come under Excep. 1 to S. 499 must be true in fact. [P 261 C 2]

If a statement made by a witness in a judicial proceeding is true in fact and also relevant to the matter under investigation, it is for the public good that it should be made. [P 261 C 2]

(b) Evidence Act (1872), S. 132—**Protection afforded by S. 132 must be claimed by witness before he makes statement in respect of which question is subsequently raised.**

The protection afforded by S. 132, Evidence Act, must be claimed by a witness before he makes the statement in respect of which a question is subsequently raised. [P 262 C 1]

One S made a report to the police that the accused had committed a theft. Upon investigation the report was found to be false and S was pro-

secuted under S. 182, Penal Code. In that case the accused, as prosecution witness, made a statement that he had not committed the theft and that S had made a report against him through enmity as they had had a quarrel about a partition wall. He went on further to explain that he had an intrigue with an aunt of S.

Held: that the accused could not in respect of the latter statement claim the benefit of the protection afforded by S. 132 inasmuch as he should have claimed the protection before he made the statement. [P 262 C 2]

P. L. Banerjee—for Applicant.

R. K. Sorabji—for Opposite Party.

Judgment.—The circumstances out of which this application for revision arises are as follows. One Sarju made a report to the police in which he alleged that Sital, who is the respondent to the present application, had committed theft. Upon investigation this report was found to be false and a prosecution was instituted against Sarju under S. 182, I. P. C., for having given false information to a public servant. Sital appeared as a witness for the prosecution in this case. He began by deposing that he had not committed the theft of which Sarju had accused him. The next question put to him must have been, "why then did Sarju make this false report against you?" He replied that Sarju bore him enmity and went on to explain the grounds of that enmity. He said, first, that there had been a quarrel between them about a partition wall between their courtyards. Apparently he felt it necessary to explain further, though it is impossible to say whether or not this explanation was added in reply to a direct question. He said that there had been for some time an intrigue between himself and an aunt of Sarju named Mt. Chhotki.

It appears that this Chhotki is a married woman, and the result of the statement made by Sital in Court was to bring social discredit on Kallu, the husband of the said Chhotki. It is in evidence that proceedings were taken by a panchayat of the brotherhood to which Kallu and Sital both belonged. It is quite clear therefore and is not denied that Sital's statement with regard to his intrigue with Mt. Chhotki was defamatory of Kallu within the meaning of S. 499, I. P. C. It is also quite impossible to hold that at the time when he made this statement Sital had no reason to believe that this imputation would be harmful to the reputation of Kallu. It may be that before this matter can be completely disposed of, the trial Court will have to direct its mind to the

question whether Sital made this statement intending to harm Kallu's reputation or whether the harm thus resulting to Kallu's reputation was present to his mind when he made the statement so that he could be said to have made the same "knowing that it was likely" to do harm. These considerations would be relevant on the question of sentence. But at the very lowest it cannot be denied that Sital had reason to believe that the imputation would do harm. If Kallu had believed the assertion made by Sital as to the unchastity of Mt Chhotki to be true, he could have prosecuted him on his own admission for having committed an offence punishable under S. 497, I. P. C. Apparently Kallu believes that imputation to be false; in fact he has accordingly instituted a prosecution against Sital for the offence of defamation punishable under S. 499, I. P. C. The Magistrate who tried the case seems to have thought that he had only to consider whether the imputation made by Sital against the chastity of Kallu's wife had been made maliciously and, as he says, "merely with a view to disgrace Kallu," or whether it was made as a necessary part of the narrative which Sital had to lay before the Court in the course of his deposition. Holding it not to be proved that the imputation had been made "with intent to cause disgrace," the Magistrate passed an order of discharge. Kallu brought the matter before the Sessions Judge, asking that Court to set aside the order of discharge and to direct further inquiry. The learned Sessions Judge has disposed of the matter in an elaborate order, in which he has discussed the previous decisions of this Court bearing on the questions of law involved. The conclusion which he comes to is that, if a witness makes a statement in the course of a deposition in Court, and the statement is one relevant to the matter in hand, the Court will presume the said statement to have been made "in good faith for the protection of the interests of the person making it," within the meaning of Excep. 9 S. 499, I. P. C.

I do not myself think that this is a sound proposition of law and I am quite certain that it is not to be reconciled with the decision of the majority of a Full Bench of this Court in the case of *Emperor v. Ganga Prasad* (1). I do not altogether agree with the learned Session

1. (1907) 29 All 685.

Judge when he says that Excep. 9 to S. 499, I. P. C., is the only one to which a witness could apply for protection in respect of a defamatory statement made by him under the sanction of the oath in the course of a judicial proceeding. Excep. 9 is intended primarily to apply to statements which the accused cannot prove to have been true in fact, or which are mere expressions of opinion, or otherwise of such a nature that the question whether they are or are not true in fact does not arise. Ordinarily, Excep. 1 would apply to statements made by witnesses in the course of judicial proceedings, provided those statements are true. They must be true in fact in order to come under Excep. 1 at all, and if they are true in fact, and also relevant to the matter under investigation, it is obviously for the public good that they should be made. In the present case these considerations are not of great importance, because, as the learned Sessions Judge himself rightly points out, Sital's allegation against the chastity of Mt. Chhotki could not have been made in good faith unless it was in fact true. If there were no other provision of the law to be considered except S. 499, I. P. C., the position of a witness in respect of offences under that section would be a difficult one. He would be liable to prosecution with regard to any statement made by him of a defamatory nature and on such prosecution being instituted, the provisions of S. 105, Evidence Act, would throw upon him the burden of proving that the statements were in fact true. The legislature however seems to me to have fully realized this difficulty and to have made adequate provision for the same by means of S. 132, Evidence Act. To my mind the real question in this case is one of the interpretation of that section and its application to the facts of this case.

A witness giving evidence in a judicial proceeding is under an obligation by law to state nothing which is not true and by reason of the oath or solemn affirmation taken by him in the presence of the Court, to state, not merely the truth, but the whole truth touching the matter in question before the Court. Now under S. 132, Evidence Act, no answer which a witness is compelled to give when giving evidence as to any matter relevant to the matter in issue in any suit, or in any civil or criminal proceed-

ing, can subject him to any arrest or prosecution, or be proved against him in any criminal proceeding, except on a prosecution for giving false evidence by such answer. A witness who has made a statement in the course of his deposition defamatory of another person, if he can claim the protection of this section, is absolutely safe so long as he has told the truth. If he has said what is not true, he can be prosecuted for giving false evidence and even as regards the institution of such prosecution he is under the protection of the Court before which his evidence was given. He cannot be prosecuted without the sanction of that Court. Now if it could be argued that the defamatory statement in this case was one which Sital "was compelled" to make, within the meaning of S. 132, Evidence Act, the present prosecution would necessarily fail, and the order of discharge passed by the Magistrate would be perfectly correct. The question of the meaning of the words "no such answer which a witness is compelled to give" in the latter part of the aforesaid S. 132 was considered by a Full Bench of the Madras High Court in *Queen v. Gopal Doss* (2) and also by the Chief Justice of this Court in the case of *Queen-Empress v. Moss* (3).

In both these cases it was laid down that the protection afforded by S. 132, Evidence Act, must be claimed by the witness before he makes the statement in respect of which a question is subsequently raised. Obviously no form of words can be prescribed in which this claim is to be made, and I conceive that cases may arise in which the Courts will be compelled to hold that the claim has been made by implication or that the witness was placed under practical compulsion to answer certain questions by the mere fact of his appearance in the witness box. Whether this be so or not, I think the principle laid down in these rulings fully applies to the facts of the present case. After Sital had stated that the charge brought against him by Sarju was false and made because of antecedent enmity existing between them, and that this enmity resulted from a quarrel about the partition wall, he should either have contented himself with that statement or have claimed protection of the Court.

It is not obvious on the face of the record as it stands that Sital was under any real necessity to go further. It has been brought to my notice that Kallu was one of the witnesses summoned for the defence in the case in which Sarju was on his trial, and it is open to argument whether Sital's conduct in alleging the existence of an intrigue between himself and Mt. Chhotki may not have been in part at any rate intended to discount beforehand the value of any evidence which Kallu might give in Sarju's defence. If he really felt that the Court could not otherwise properly appreciate the nature of the grudge borne him by Sarju and the strength of the motives which impelled Sarju to make a false report to his disadvantage, he ought to have claimed the protection of the Court. The statement which he proceeded to make was one against the character of a woman. It was seriously injurious to that woman's husband, who was not a party to the proceedings then before the Court, and one cannot help remarking that it was a statement which a man with any sentiment of honour would have been very reluctant to make.

Assuming in Sital's favour that this particular defamatory statement was extracted from him by some further question, I cannot avoid the feeling that it is a statement which he should naturally have shrunk from making. It would have been easy for him to reply that the quarrel about the partition wall was connected with another matter in respect of which he could not lay the entire facts before the Court without making a statement which would criminate him or expose him to prosecution or other penalty. It seems to me at least possible that, if he had said this, the Court would not have compelled him to answer the question, unless such answer had been pressed for by Sarju himself in the exercise of his rights as an accused person and, of course, if Sarju had chosen to press the question, the responsibility for the answer would have rested largely upon him and the witness would have been completely protected by the provisions of the Statute Law. In my opinion, the order of discharge in this case cannot be supported on legal grounds, nor am I prepared to allow that the case is one in which the technicalities of the law should be regarded as bearing hardly upon the accused

2. (1881) 3 Mad 271.

3. (1894) 16 All 88.

person. I set aside the order of discharge in this case and send the case back, through the Sessions Judge, to the trial Court, directing the Magistrate to proceed with the trial of the case and to dispose of it in the light of the principles which I have taken it upon me to lay down. In reply to a suggestion made to me on behalf of the applicant that the case is one which might be more efficiently tried by a Magistrate with a knowledge of the English language, I think it sufficient to say that while it seems to me right and proper that the case should be sent back to the Magistrate who passed the order of discharge, my order is not to be interpreted as precluding the District Magistrate from exercising his power of transferring the case, if he should see adequate reason to do so.

V.B./R.K.

Case sent back.

A. I. R. 1918 Allahabad 263

RICHARDS, C. J. AND TUDBALL, J.

Mohammad Niaz Khan and others—
Plaintiffs—Appellants.

v.

Mohammad Adrees Khan and another—
Defendants—Respondents.

Second Appeal No. 1280, of 1915, Decided on 16th January 1918, against decree of Dist. Judge, Ghazipore, D/- 4th May 1915.

(a) Mahomedan Law—Pre-emption—Parties to sale cannot defeat right of pre-emption by dressing sale in garb of lease.

Where a transaction in its nature is a sale, the vendor and vendee cannot defeat the right of pre-emption arising under the Mahomedan law by dressing it up in the garb of a lease. [P 263 C, 2]

(b) Deed—Construction—Sale or lease—Facts to be considered stated.

In determining the real nature of the transaction the Court is entitled to take into consideration the sum paid down, the amount of the rent reserved and the value of the property. [P 263 C 2]

*Muhammad Ishaq Khan—*for Appellants.

*S. M. Sulaiman and Iqbal Ahmad—*for Respondents.

Judgment.—This appeal arises out of a suit brought for pre-emption, under the Mahomedan law. The property transferred is a small piece of land in the town of Zamania. The transfer was made in the form of a perpetual lease. The amount paid down was the sum of Rs. 250 and a nominal rent of 2 annas per annum was reserved. The Court of first instance decreed the suit, holding that there was a sale and that the plaintiff

had a right. The lower appellate Court held that pre-emption under the Mahomedan law did not apply to the case of leases; accordingly without deciding the other issues the lower appellate Court reversed the decree of the Court of first instance and dismissed the suit. We think, reading the judgment of the lower appellate Court, that the learned District Judge never intended to overrule the finding of the Court of first instance that the transaction though carried out in the form of a lease was in the reality a sale. We think that he intended to decide that a Mahomedan could make the transfer in the form of a lease, notwithstanding that the real intention of the parties was a sale and so to defeat pre-emption, in other words, that such devices are not unknown in the Mahomedan law and are legitimate. In our opinion the Court was entitled and bound on the issue being raised to consider at the instance of the plaintiff claiming pre-emption what was the real nature of the transaction. It was entitled to consider the sum which was paid down, the smallness of the rent and the value of the property, and if after considering all these matters it came to the conclusion that the transaction was in truth and fact a sale, it should hold that the right of pre-emption arose and proceed to consider whether the plaintiff by due observance of the requirements of the Mahomedan law was entitled to get the property.

If the Court came to the conclusion that in truth and substance—and not merely in form—the transaction was a lease, then the suit should be dismissed on the ground that the Mahomedan law does not apply to transfers by way of leases. It has been more than once decided in this Court that where a custom of pre-emption prevails upon sale, the vendor and vendee cannot defeat the pre-emptor by dressing up the transaction in the garb of a lease. The same thing has been held in the Punjab, where apparently the right of pre-emption is regulated by Act. We can see no good reason why the same principle should not apply to cases where the right is one under the Mahomedan law. It is clear that the case must go back to the lower appellate Court. We accordingly allow the appeal, set aside the decree of the lower appellate Court and remand the

case to that Court with directions to re-admit the appeal upon its original number in the file and proceed to hear and determine the same according to law, regard being had to what we have stated. Costs here and heretofore will be costs in the cause.

V.B./R.K.

Appeal allowed.

A. I R. 1918 Allahabad 264

KNOX, J.

Ajnasi Kuar and others—Plaintiffs—Appellants.

v.

Prayag Singh — Defendant—Respondent.

Second Appeal No, 1219 of 1916, Decided on 20th February 1918, from the decree of Dist. Judge, Benares, D/-2nd May 1916.

Agra Tenancy Act (1901), Ss. 156 and 158—Suit for assessment of rent does not fall outside scope of S. 156—Interpretation of Statutes, Headings.

In a suit under S. 156, for the assessment of rent of certain land in the occupancy tenancy of the defendant who had refused to pay rent, the lower appellate Court held that the plaintiff was not entitled to any remedy under Ch. 10, Agra Tenancy Act, on the ground that the chapter was headed "Resumption of rent-free grants:"

Held: (1) that reliance could not be placed upon the "headings" of chapters or descriptions given of sections in the margin of the same, especially in the case of the Agra Tenancy Act, which could not be said to be a model of good drafting; (2) that the suit did not fall outside the scope of S. 156. [P 264 C₂]

M. L. Agarwala—for Appellant.

Durga Charan Banerji—for Respondent.

Judgment.—This second appeal arises out of a suit brought by Mt. Ajnasi Kuar and another against Prayag Singh. In the plaint which Mt. Ajnasi Kuar filed in the Revenue Court she described her suit as a suit for assessment of rent under S. 150/156, Act 2 of 1901, or assessment of revenue under Ss. 150/158, Act 2 1901. She goes on to say that until the last settlement the defendant was in possession of the land in dispute as a tenant by paying rent to the plaintiffs' ancestor and to the plaintiffs. He was in possession as an occupancy tenant. At the last settlement the name of the defendant was by mistake entered as the purchaser of shankalp property. Since that date or thereabouts the defendant on the strength of the wrong entry has denied responsibility for paying rent and the plaintiff-

iffs pray that a rent of Rs. 26-2-0 a year or as much as the Court may deem proper be assessed on the land in dispute under Ss. 150/156. She also prayed for an alternative relief; she asked that revenue might be assessed on the plots of land in dispute under Ss 150/156, Act 2 of 1901. There can be no doubt that what the plaintiff intended and aimed at was relief to be granted her under S. 156 or S. 158, Act 2 of 1901. In the written statement the defendant, as his written statement shows, fully realized this and contended that the suit under Ss. 150/156 was not cognizable by the Revenue Court. He set up other allegations, such as that he was zemindar in proprietary possession of the property in dispute; that the plaintiff had admitted the defendant was in possession free from payment of rent, etc.

The Court of first instance came to the conclusion that the defendant was an occupancy tenant and fixed Rs. 20 per year as the rent of the holding in suit. The matter went in appeal to the District Judge of Benares and before that Court several pleas were taken. Among them was a plea to the effect that Ch. 10 of the Rent Act was not applicable. The lower appellate Court took up this plea and held that the plaintiff was not entitled to any remedy under Ch 10 of the Tenancy Act and refused to decide any issue arising between the parties. Its main reason for arriving at this conclusion is that S. 156, Act 2 of 1901, comes within a chapter which is headed "Resumption of rent-free grants". This Court has elsewhere pointed out that reliance cannot be placed upon the "headings" of chapters or descriptions given of sections in the margin of the same. I think this applies with peculiar force to such headings, etc., in an Act such as Local Act 2 of 1901, which cannot be held to be a model of good drafting. The matter in dispute had been clearly put and clearly met and does not seem to be beyond the provisions of S. 156 as they stand in the Act. The subject-matter of the suit was land not liable to resumption under S. 154 or land to which the provisions of S. 158 applied. The issue was, whether it was liable to assessment of rent or not? I set aside the finding of the lower appellate Court on the preliminary point and return the case to the lower appellate Court with directions to re-admit the appeal upon the list of pending appeals and dispose of

it according to law. costs will follow the event.

V.B./R.K.

Case remanded.

A. I. R. 1918 Allahabad 265

PIGGOTT, J.

Debi—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 889 of 1917, Decided on 4th January 1918, from order of Sess. Judge, Farrukhabad.

Penal Code (1860), S. 182—Peon of Court of Wards submitting petition of resignation containing distorted version of his quarrel with co-servant—Petition is not complaint and peon was not guilty under S. 182.

The accused, a peon of the Court of Wards, had a quarrel with one S, brother of a zilladar employed by the Court of Wards, and afterwards submitted a petition of resignation to the Collector, the officer in charge of the Court of Wards, in which he gave a distorted version of the whole affair in order to forestall any proceedings which might be taken against him by S. or his brother;

Held: (1) that the petition did not amount to a complaint;

(2) that the accused was not guilty of an offence under S. 182, I. P. C. inasmuch as he never intended the Collector to use his powers to the injury or annoyance of the persons mentioned in the petition nor had he any knowledge that such a result was likely. [P 265 C 2]

Satya Chandra Mukerji—for Applicant.

R. Malcomson—for the Crown.

Judgment.—I take what seems to me the essential facts of this case from the judgment of the learned Sessions Judge. The applicant *Debi*, being at the time a peon in the service of the Court of Wards had a quarrel with a youth of the name of *Shiam Deo*, brother of one *Suraj Bali*, zilladar in the service of the Court of Wards. The quarrel resulted in a scuffle and came to the notice of *Mrs. Thomas*, wife of the Special Manager locally employed by the Court of Wards. She interposed to stop the scuffle and later on *Suraj Bali* appears to have complained to the Special Manager, *Mr. Thomas*. Under these circumstances *Debi* addressed to the Collector, the officer in charge of the Court of Wards, a petition in which he requested to be allowed to resign his employment. In that petition he embodied his own version of his affray with *Suraj Bali's* brother; and I have no doubt that in so doing he departed from the truth and made statements defamatory to *Mrs. Thomas*. The Collector seems to have felt it incumbent on him to make some enquiry into the matter and to record the

statements on oath of *Debi* and *Shiam Deo*. The Sessions Judge says that this was done by the Collector of the District in the exercise of his powers as District Magistrate, but this I hesitate to believe. The petition addressed to the Collector by *Debi* did not amount to a complaint and the criminal offence therein referred to was not a cognisable one. At any rate, the result was that the Collector satisfied himself that the allegations made in *Debi's* petition against *Mrs. Thomas* were untrue and he ordered his prosecution for committing an offence punishable under S. 182, I. P. C.

I have to consider in revision whether the petition presented by *Debi* supplied the necessary ingredients for such an offence. I wish to make it quite clear that if that petition had contained any allegations against any person employed as a subordinate under the orders of the Collector of the district as Manager of the Court of Wards, I should have been prepared to hold that the making of such allegations under the circumstances amounted to an offence under S. 182, I. P. C. The presumption would be that the person complaining to a superior officer of misconduct on the part of his subordinate intended that the superior officer in question should use his powers to the injury or annoyance of the person complained of or at any rate knew that such a result was likely. I do not think however that anything in *Debi's* petition can be construed as an allegation either against *Mr. Thomas*, or against *Suraj Bali*. Reading this petition in connection with the facts as found by the Sessions Judge, it seems to me that *Debi's* object was firstly to get his resignation accepted at once so that he might leave the neighbourhood, and secondly, to place on record a document containing a distorted version of what had actually happened in order to discount beforehand any proceeding which might be instituted against him by *Suraj Bali* or his brother in a criminal Court, or by *Mr. Thomas*, as Special Manager of the Court of Wards, for his dismissal from his employment. I certainly do not think that he intended that the Collector should use his powers as Manager of the Court of Wards so as to cause injury or annoyance to *Mrs. Thomas* or to *Suraj Bali's* brother nor am I prepared to infer that he knew it to be likely that such a result would follow. I do not think the

conviction can be affirmed. I set aside the conviction and acquit Debi of the offence and direct that the fine if paid, be refunded.

V.B./R.K.

Conviction quashed.

A. I. R. 1918 Allahabad 266

PIGGOTT, J.

Amir Hasan Khan—Applicant.

v.

Emperor—Opposite Party.

Criminal Ref. No. 186 of 1918, Decided on 18th April 1918, Reference made by Sess. Judge, Cawnpore.

U. P. Municipalities Act (1916), S. 307 (b) — Failure to comply with notice — Continuous fine held illegal — When daily fine may be imposed—Principle stated.

The accused was convicted under S. 307 (b), for failure to comply with a notice issued by the Municipal Board requiring him to construct a drain on certain property and was fined Rs. 5. By the same order the Magistrate directed him to pay a further fine of Rs. 1 per diem from the date of the order until the notice issued by the Municipal Board was satisfactorily complied with:

Held: that the latter part of the order was illegal. [P 266 C 2]

The liability to a daily fine in the event of a continuing breach, has been imposed by the Legislature in order that a person contumaciously disobeying an order lawfully issued by a Municipal Board may not claim to have purged his offence once and for all by payment of the fine imposed upon him for neglect or refusal to comply with the said order. The liability will require to be enforced, as often as the Municipal Board may consider necessary, by institution of a second prosecution, in which the questions for consideration will be, how many days have elapsed from the date of the first conviction under the same section during which the offender is proved to have persisted in the offence and, secondly, the appropriate amount of the daily fine to be imposed under the circumstances of the case subject to the prescribed maximum of Rs. 5 per diem. [P 266 C 2]

Sital Prasad Ghosh—for Applicant.

R. Malcomson—for the Crown.

Judgment.—The learned Sessions Judge of Cawnpore has referred to this Court in revision two orders passed by a Magistrate of the First Class subordinate to him in connexion with certain prolonged proceedings which have been going on between the Municipal Board of Fatehpur and a gentleman of the name of Munshi Amir Hasan Khan, who I understand, is a member of the legal profession for something more than one and a half years past. On 8th January 1917, it was proved against the said Amir Hasan Khan that he had failed to comply with a notice directing him to

execute a certain work in respect of certain property, namely, a drain about which there was some contention between him and the Municipal Board. Under S. 307, Cl. (b), U. P. Municipalities Act, which came into force on 1st July 1916, Munshi Amir Hasan Khan was liable to a fine which might extend to Rs. 500 and in case of a continuing breach he was liable to a further fine which might extend to Rs. 5 for every date after the date of the first conviction during which it might be proved against him that he had persisted in the offence. The trying Magistrate imposed the almost nominal fine of Rs. 5; but instead of contenting himself with warning the accused of the further liability which would attach to him from the date of this conviction, he purported by this very order of 8th January 1917, to direct Munshi Amir Hasan Khan to pay a further fine of Rs. 1 per diem from 9th January 1917, until the notice issued by the Municipal Board in respect of the drain in question should be satisfactorily complied with. As the learned Sessions Judge has pointed out, the latter portion of this order is illegal.

The liability to a daily fine in the event of a continuing breach, has been imposed by the Legislature in order that a person contumaciously disobeying an order lawfully issued by a Municipal Board, may not claim to have purged his offence once and for all by payment of the fine imposed upon him for neglect or refusal to comply with the said order. The liability will require to be enforced as often as the Municipal Board may consider necessary, by institution of a second prosecution, in which the questions for consideration will be, how many days have elapsed from the date of the first conviction under the same section during which the offender is proved to have persisted in the offence and, secondly, the appropriate amount of the daily fine to be imposed under the circumstances of the case, subject to the prescribed maximum of Rs. 5 per diem. To begin with therefore I must accept the reference of the learned Sessions Judge with regard to the order of 8th January 1917. The following words will be deleted from the said order, namely:

“and also from to-morrow to a further fine of Rs. 1 per diem till the arch in question is removed.”

The next question which I have to consider is an order passed by the same Magistrate on 23rd November 1917. The matter was laid before this Magistrate in the form of a simple application asking him to enforce that portion of the order of 8th January 1917, which I have left it my duty to set aside. The Magistrate has, as a matter of fact, inquired into one of the two questions which I have suggested above as essential in the event of a further prosecution in respect of a continuing breach. He has considered carefully how many days had elapsed since the order of 8th January 1917, during which Munshi Amir Hasan Khan was proved to have persisted in his disobedience to the order of the Municipal Board. He has not however made any attempt to form an independent opinion as to the gravity of the offence committed, as to the excuses which might be offered (and which apparently were offered) for the conduct of the accused and as to the amount of the daily fine the imposition of which would satisfy the ends of justice. I am gratified to find, and it is one of the few circumstances in connexion with my examination of this record which is calculated to afford any satisfaction, that the Magistrate has come to the conclusion that compliance has now been made with the notice issued by the Municipal Board, he has held that such compliance was made, according to one part of his order, on 7th September 1917, but according to another part of the same order, on 17th September 1917. Further I find that Munshi Amir Hasan Khan has admitted liability to a certain extent. He has made practical acknowledgment of his error by paying a sum of Rs. 139 in the way of a fine for his continuing breach of the notice issued to him.

It is quite possible, that if the Magistrate who inquired into this matter, had felt himself at liberty to exercise his discretion in the same, he might have fixed the amount of the daily fine at a sum which would have made this payment of Rs. 139 sufficient to clear the accused person from liability. While therefore I should have been reluctant to interfere upon a merely technical ground with the proceedings resulting in the order of 23rd November 1917, had I thought that every thing which an accused person in a proceeding taken in respect of a continuing breach under

S. 307, Cl. (b), Local Municipalities Act, was entitled to have inquired into and considered, had been as a matter of fact so inquired into and taken into consideration by the Magistrate, I think that this order of 23rd November 1917, is open to objection in substance as well as in form. I set it aside accordingly. The sum of Rs. 102 required under the terms of this order to be paid by the accused Munshi Amir Hasan Khan, if paid, will be refunded.

It will be observed that, while accepting the rest of the reference made by the learned Sessions Judge I have passed no order directing any refund in respect of the sum of Rs. 139 paid by Munshi Amir Hasan Khan prior to the order of 23rd November 1917. No doubt that payment was actually made in compliance with that portion of the order of 8th January 1917, which I have set aside as inoperative; but a liability to a fine for a continuing breach attached to Munshi Amir Hasan Khan under the provisions of the Statute itself, independently altogether of the above order. He has virtually assessed his own liability at Rs. 139 and I can see no reason why this should not be accepted. At any rate I pass no order of re-payment in respect of this sum of Rs. 139. Let the record be returned.

V.B./R.K.

Record returned.

A. I. R. 1918 Allahabad 267

TUDBALL, J.

Satola and others—Applicants.

v.

Emperor—Opposite Party.

Criminal Ref. No. 1019 of 1917, Decided on 19th January 1917, Reference made by Dist. Magistrate, Jhansi.

(a) U. P. Municipalities Act (1916), S. 326 (1)—S. 326 (1) does not apply to criminal proceedings.

Section 326 (1) has nothing to do with proceedings in a criminal Court. It relates only to suits of a civil nature in a civil Court. It does not, therefore, apply to prosecutions under the Cattle Trespass Act. (P 268 C 1)

(b) Cattle Trespass Act (1871), S. 22—Municipal servant impounding cattle of complainant—No damage to Municipal trees—Servants are liable to pay compensation under S. 22.

Accused, servants of a Municipality, seized and impounded cattle belonging to the complainant which had not done any damage to Municipal trees:

Held: that the seizure was illegal and unjustified and that the accused were liable to pay compensation under S. 22. (P 268 C 1)

R. Malcomson—for the Crown.

Judgment.—This case has been referred to this Court by the District Magistrate of Jhansi. The facts are simple on the evidence and as found by the Magistrate. The accused persons are certain municipal servants who illegally and without justification seized and impounded cattle belonging to the complainant. A complaint was made before a Joint Magistrate under S. 22 of the Cattle Trespass Act, and it was transferred by him to the Court of the Third Class Magistrate for decision. The Magistrate found the accused guilty and directed them to pay Rs. 10 as compensation to the complainant under S. 22 of the Act. The District Magistrate admits in his order of reference that the case is trivial, but is of opinion that the lower Court's order was illegal and irregular, because the accused persons were servants of the Municipality and quite within their rights in impounding cattle damaging Municipal trees, and that the Court ought to have acted under S. 326 (1), Municipalities Act. The District Magistrate at the end of his reference expresses what to me is an astounding opinion. He says:

"the lower Court may or may not believe the evidence, but I think it is exercising a very unwise discretion in fining them."

In the first place, S. 326 (1), Municipalities Act, has nothing to do with the proceedings in a criminal Court. It relates only to suits of a civil nature in a civil Court. The wording of the section is plain and it has nothing to do with prosecutions under the Cattle Trespass Act. In the next place, it is very material indeed whether the evidence for the prosecution in the case was worthy of belief or not. The Magistrate has given his reasons and they are fairly cogent for holding that the seizure of the cattle was without justification and that no damage whatever had been done to the Municipal trees. No municipal servant is authorized in these circumstances to seize and impound cattle. It is only where the latter are damaging or have damaged the Municipal trees, that these servants would be at all justified in impounding them. I must say I am surprised that the learned Sessions Judge should have sent up a reference of this nature without any remarks and without any expression of opinion. There is absolutely no force whatsoever in it and the time of this Court and other persons has been unnecessarily wasted in

a very trivial matter. Let the record be returned.

V.B./R.K.

Record returned.

A. I. R. 1918 Allahabad 268

TUDBALL AND ABDUL RAOOF, JJ.

Mithan Lal—Plaintiff—Appellant.

v.

Chhajju Singh—Defendant—Respondent.

Second Appeal No. 757 of 1916, Decided on 6th March 1918, from decree of Dist. Judge, Meerut.

Mortgage—Construction—Usufructuary mortgage of zamindari—Mortgagee giving lease for term of mortgage of same—Suit for arrears of rent by mortgagee—Equity of redemption sold in execution of decree—Subsequent suit for arrears of rent—Mortgagor is liable to pay rent as long as mortgage lasted whether or not he became exproprietary tenant of zamindari—Agra Tenancy Act (1901), S. 10—U. P. Land Revenue Act (1901), S. 36.

The defendant gave a usufructuary mortgage of his zamindari to the plaintiff, who on the same date gave a lease of the same, to last during the term of the mortgage, to the defendant, who remained in possession as thekadar paying rent to the plaintiff under the lease. The rent having fallen into arrears, the plaintiff sued defendant, obtained a decree and caused the equity of redemption to be sold in execution. The plaintiff's mortgage was notified at the time of sale. No application for mutation of names was made and the record stood as it was at the date of the mortgage. The plaintiff again sued the defendant for arrears of rent for a period partly prior and partly subsequent to the date of the sale of the equity of redemption. The defendant denied his liability for the latter period on the ground that as his equity of redemption had been sold, he had become an exproprietary tenant and that as no rent had been fixed by the Collector under S. 36, U. P. Land Revenue Act, he was not liable to pay rent in respect of that period:

Held: that so long as the mortgage subsisted, the defendant was a thekadar under his lease and as such liable to pay the rent stipulated for in the lease, whether or not he also became an exproprietary tenant of the zamindari. [P 269 C 2]

Sital Prasad Ghosh and Uma Shankar Bajpai—for Appellant.

Harilans Sahai—for Respondent.

Judgment.—This is a plaintiff's appeal. The facts out of which it has arisen are briefly as follows:—The defendant was the owner of certain zamindari share, the area of which was some 13 bighas odd. On 23rd July 1908, he gave a usufructuary mortgage of this zamindari to the plaintiff. On the same date the plaintiff gave him a lease of the same zamindari share on payment of a sum of Rs. 70-14-0 per annum plus Rs. 23-11-0 Government demand, etc. The defendant

remained in possession as thekadar paying his rent to the plaintiff under the lease.

On 26th June 1912. the plaintiff sued him on the basis of that agreement for arrears of rent and obtained a decree and in execution of his decree for the arrears of rent due under the lease, he attached and put to sale the defendant's equity of redemption. This was sold on 20th March 1913, and was purchased by one Bhuttu Mal. At the time of the sale the plaintiff's mortgage and one other mortgage were also notified. The price paid for the property at the sale was Rs. 40. Bhuttu Mal did not apply for mutation of names and the Government record still stands as it was on the date of the original mortgage. The plaintiff has now, on the basis of the lease, sued his thekadar, the defendant, for the rent for a period which commenced prior to 20th March 1913 and runs up to a date subsequent to that date. The defendant in his written statement merely pleaded that he was liable for the rent up to 20th March 1913, but that for the period subsequent to that he was no longer liable under the lease because his equity of redemption had been sold and purchased by Bhuttu Mal. The Court of first instance in the course of its judgment made the remark that

"the mortgagor's right to redeem had been put to auction by the plaintiff-decree-holder who had purchased it for Bhuttu Mal on 20th March 1913."

It is quite clear that the defendant had nowhere pleaded that Bhuttu Mal was the benamidar of the plaintiff or that Buttu Mal had purchased the property for and on behalf of the plaintiff. There was no issue on this point. There was no allegation or denial, no evidence and no finding. The Court of first instance held that the purchase by Bhuttu Mal of the defendant's equity of redemption did not affect the case at all, that the lease subsisted and that the defendant was liable under the lease. It accordingly decreed the suit. The lower appellate Court on the defendant's appeal has held that after the 20th March 1913 the defendant became the ex-proprietary tenant of the land because the equity of redemption had been sold; that he was entitled to take up his position as an exproprietary tenant and as no rent had been fixed, he was not liable to pay any rent for the period sub-

sequent to 20th March 1913. The plaintiff appeals.

It is quite clear to us that the Judge of the Court below has misunderstood the nature of the plaintiff's claim. It is based on the theka which was given to the defendant on 23rd July 1908. We will assume that the defendant is the ex-proprietary tenant of the land. He is equally a thekadar under the contract of 23rd July 1908. If the period of that contract has come to an end, then of course the plaintiff's claim must fail, because the theka no longer subsists, but so long as the theka subsists the plaintiff is entitled to recover from his thekadar the rent which the latter has agreed to pay. He may, as an exproprietary tenant, be a tenant of the land under himself as thekadar. If the theka had been given to an outside person, there is no question that so long as it subsists the thekadar would be liable for the rent. The lower Court in its judgment has stated that Bhuttu Mal appears to have been a benamidar for the plaintiff. It has however come to no decision on the point, nor could it do so, for the simple reason that the issue had not been raised, no evidence taken upon it, and there had been no decision on it. The point would have been material if it had been raised, because the lease was to subsist only so long as the mortgage subsisted. If the defendant had pleaded and had proved to the Court that the mortgage had come to an end, then the plaintiff's claim would have failed, but he is not allowed to raise a question of fact in second appeal on which there were no pleadings, on which there was no issue and to which no evidence was directed. The case must be decided on the assumption, right or wrong, that the mortgage still subsists and that Bhuttu Mal is the owner of the equity of redemption which was purchased in his name. This being so, the lease must still subsist and whether the defendant be or be not the ex-proprietary tenant of the land, he is liable as thekadar to his lessor. In this view we must allow the appeal, set aside the decree of the lower appellate Court and restore that of the Court of first instance. The plaintiff will have his costs in all Courts. The Court of first instance granted the plaintiff a decree for what it has called "usual interest." This interest will run from the date of the suit up to the date

of realization, and at the rate of 6 per cent. per annum simple.

V.B./R.K. *Appeal allowed.*

A. I. R. 1918 Allahabad 270

RICHARDS, C. J. AND BANERJI, J.

Angad Singh and others—Defendants
—Appellants.

v.

Zorawar Singh and others—Plaintiffs
—Respondents.

Letters Patent Appeal No. 88 of 1916,
Decided on 7th December 1917, from a
judgment of Rafique, J.

Agra Tenancy Act (1901), S. 164—Profits
of *sir* and *khudkasht* land—Some cosharers
neglecting to cultivate their share—They
are not entitled to call upon other cosharers
to account for profits of their share of *sir*
or *khudkasht* unless they are cultivating
area in excess of their share.

If different cosharers in a mahal are entitled
to different portions of the mahal as their *sir*
or *khudkasht* each cosharer would be entitled
to the profits of his own *sir* and *khudkasht* and
would not be obliged to account for those profits
to the other cosharers. On the other hand, if
any cosharer has in his hands and in his own
cultivation an excess of land, over and above his
proper share of *sir* and *khudkasht*, he must ac-
count for the excess. The share of each cosharer
need not necessarily be identical in area, be-
cause a larger share of inferior land might be
given to one cosharer where the others have
land of superior quality. If some cosharers
neglect to cultivate their shares of *sir* and *khud-*
kasht they are not entitled to call upon the
other cosharers to account for the profits of their
sir or *khudkasht* unless the latter are cultivat-
ing an area in excess of their share.

[P 270 C 2; P 271 C 1]

M. L. Agarwal and *Peary Lal Banerji*—for Appellants.

Tej Bahadur Sapru—for Respondents.

Judgment.—This appeal arises out
of a suit brought in the Revenue Court
for profits. One of the plaintiffs hap-
pened to be the lambardar, but we think
that this fact ought to be left out of con-
sideration for the purposes of the case.
The plaintiff is not suing as lambardar.
He is suing as one of the cosharers. The
learned Assistant Collector at the com-
mencement of his judgment says:

"The peculiarity of this case is that one of
the plaintiffs is the lambardar and the defen-
dants being only pattidars have so much land
as *sir* and *khudkasht* that the lambardar in-
stead of distributing profits has been reduced to
the position of a sharer claiming profits."

The defence to the suit was that the
defendants were not in the habit of mak-
ing any collections, and that any profits
that they had in their hands were the
profits from their own *sir* and *khudkasht*
and that they had not more *sir* and

khudkasht than represented their share
in the village. Another defendant pleaded
much the same thing but also alleged
that the plaintiffs, particularly the
lambardar plaintiff had purposely allowed
land to go out of cultivation. The Court of
first instance gave a decree in the plain-
tiffs' favour for the following sums for

1317	Fasli Rs.	63-7-10
1318	" "	109-7-11
1319	" "	129-3-8

The lower appellate Court dismissed
the appeal of the defendants. In the
course of his judgment the learned Dis-
trict Judge says:

"The first point for determination is on what
basis the liability, if any, of the defendants-
appellants should be calculated. I decide that
the calculation ought to be made on the basis
of actual collections made, including of course
nominal rental of *sir* and *khudkasht*."

The defendants have appealed and it is
urged on their behalf that in a general
way the real issue between the parties
has not been decided. It would rather
seem as if the expression "basis of actual
collections" was not very appropriate be-
cause the defendants have all along
alleged that they make no collections at
all and there is nothing in the finding of
either the Court of first instance or the
lower appellate Court to show that they
did. So far as we can gather from the
findings arrived at in the Court below,
the defendants have been in possession of
a considerable amount of land and such
profits as they have in their hands are
the profits derived from land which they
have been cultivating themselves or by
subtenants. We think that if the diffe-
rent cosharers are entitled to different
portions of the mahal as their *sir* and
khudkasht, each cosharer would be en-
titled to the profits of his own *sir* and
khudkasht and he would not be obliged
to account for these profits to the other
cosharers. It would seem to be only
common justice that if one cosharer was
industrious and made a considerable
profit out of his *sir* and *khudkasht*, he
should not be obliged to share that pro-
fits with another cosharer, who neglec-
ted or was less fortunate with his *sir*
and *khudkasht*. On the other hand if
any cosharer had in his hands and in his
own cultivation an excess of land over
and above his proper share of *sir* and
khudkasht, he should certainly account
for the excess. The share of each co-
sharer in *sir* and *khudkasht* need not

necessarily be identical in area, because a larger share of inferior land might be given to one cosharer where the others had land of superior quality. We must also point out that if the plaintiffs were entitled to certain land as their *sir* and *khudkasht* and for any reason they neglected to cultivate it, they would not be entitled to call upon the defendant to account for the profits of his *sir* and *khudkasht* unless the latter was in excess of what the plaintiffs were to cultivate. After these general remarks we think it advisable to refer certain issues to the Court below before deciding the appeal:

(1) Was the land divided between the cosharers as *sir* and *khudkasht*? (2) Was the *sir* and *khudkasht* of each cosharer in proportion to his share in the village? (3) Were the defendants in possession by themselves or through sub-tenants of *sir* and *khudkasht* in excess of their share and if so, to what extent? In considering this issue the Court will have regard to the quality of the land. (4) Having regard to the findings on the above issues have the defendants realized anything and if so how much in excess of what they were entitled to? The parties may adduce further evidence relevant to the above issues. On return of the findings the usual ten days will be allowed for filing objections.

(On return of the findings, the Court delivered the following)

Judgment.—Having regard to the findings we think this appeal must fail. We accordingly dismiss it with costs.

V.B./R.K.

Appeal dismissed.

A. I. R. 1918 Allahabad 271

WALSH, J.

Kalka Prasad—Applicant.

v.

Emperor—Opposite Party.

Civil Revn. No. 170 of 1917, Decided on 22nd December 1917, from order of Dist. and Sess. Judge, Meerut, D/- 4th May 1917.

(a) Legal Practitioners Act (1879), S. 36—Evidence that may be legitimately tendered under S. 36 is of general repute and it includes hearsay evidence.

The evidence which may legitimately be tendered in a case under S. 36 is of general repute. The phrase general repute in the section clearly includes hearsay evidence which may be tested when admissible by cross-examination just as any other evidence may be tested and challenged. The words "or otherwise" are clearly

intended to include all the ordinary modes of proof known to the law which might otherwise be said to have been impliedly excluded such as personal observation, evidence of conduct, admissions in conversation and the like, proved by first hand testimony. [P 272 C 1]

(b) Legal Practitioners Act (1879), S. 36—Principles applicable to cases under S. 110, Criminal P. C., apply to cases under S. 36—Criminal P. C. (1898), S. 110.

The recognized principles applicable in cases under S. 110, Criminal P. C., apply to cases under S. 36, Legal Practitioners Act [P 272 C 1]

(c) Legal Practitioners Act (1879), S. 36 (3) Mere removal of list exhibited in District Court does not amount to cancellation of original order.

Sub-S. (3), S. 36, means that the exhibition of the copy-list there referred to is necessary to constitute a man a proclaimed tout. A mere removal or failure however to keep the list exhibited in the Court of a District Judge has not the effect of cancelling the list altogether inasmuch as it is to be exhibited in all Courts subordinate to the District Court and its mere removal in one Court out of many does not per se cancel the original order. [P 273 C 2; P 274 C 1]

A. P. Dube and *S. C. Mookerji*—for Applicant.

A. E. Ryves—for the Crown.

Judgment—These are four applications in revision made by six persons, Abdul Rahim, Iftikhar Husain, Nisar Ahmad, Rup Chand, Abdul Karim and Kalka Prasad, against one order made by the District and Sessions Judge of Meerut on 4th May 1917 ordering the names of these persons with others to be posted and put on a list of touts under S. 36, Legal Practitioners Act. Although the cases of the various applicants are not precisely similar, I propose to deal with all of them in one judgment.

The proceedings were undertaken by the District Judge at the instance of the Bar Association of Meerut, which had sat and considered the matter with great thoroughness and which supported the complaint which they made against the system of touting by a large number of persons with a considerable body of evidence. The hearing of the case was spread over a considerable period and the learned Judge devoted great pains to the performance of a difficult but highly important task. I have to consider in the case of each applicant to this Court how far he is entitled to complain of the order made against him. Before doing so however it is necessary to make one or two general observations. While exercising due care to see that each case is fairly made out by the evidence called, and is established in a hearing according

to law, it is desirable to emphasize the great importance of this legislation both to the general public and to the legal profession. The Judge has used language, none too strong, about the pests who perennially infest the Courts, though I doubt whether he is accurate in attributing their success to the technicalities of English law rather than to those of Indian Legislation. But it is common knowledge that systematic toating is inseparable from a great deal of deception and imposition practised upon poor and ignorant litigants, whose interests are subordinated to those of the needy persons who prey upon their credulity. It is also inseparable from unprofessional conduct on the part of those who employ them. It is only by the vigilant efforts of bodies like the Meerut Bar Association and by strict enforcement of statutory safeguards, that the poorer members of the public and the respectable members of the profession can obtain protection.

The nature of the evidence which may legitimately be tendered in such a case does not really admit of much controversy. The learned Judge has held that the recognized principles applicable in cases under S. 110, Criminal P. C., or the "evil livelihood" section, are applicable here. This is clearly right. Indeed it was admitted at the Bar by both sides in this case, which was well and temperately presented. The Statute says "by general reputation or otherwise." The former of those provisions clearly includes hearsay evidence which may be tested when admissible by cross examination just as other evidence may be tested and challenged. The latter provision "or otherwise" is clearly intended to include all the ordinary modes of proof known to the law which might otherwise be said to have been impliedly excluded such as personal observation, evidence of conduct, admissions in conversation and the like, proved by first hand testimony. In this case almost every possible kind of evidence was given. I note that none of the alleged touts themselves gave evidence on oath, though I can find nothing in the statute or in the general law to prevent their doing so if they chose. The Civil Procedure Code is not applicable and there seems no reason in good sense or in the general law to disentitle them to be heard on oath. It is not to be supposed that direct evidence of a specific case of

consideration passing between tout and employer can be forthcoming, except in the rarest cases. The case quoted to me from the Punjab Record is not in point. The only evidence in that case was a letter of introduction which did not suggest remuneration, and might have been perfectly harmless. But it is a reasonable and legitimate inference of fact that if a man is shown to spend the greater portion of his working hours in canvassing and introducing clients to members of the profession, he is not rendering gratuitous service such as a casual friend or acquaintance may do.

In my opinion revision may be entertained in such a case as this. It is "a case in which no appeal lies." I am aware that the contrary view has been expressed by some Judges of this Court in *Madho Ram, In the matter of the petition of* (1) The point taken was that the finding was against the weight of evidence. That is not a ground for revision and therefore it was not necessary for the Court to decide more. I do not think that it is necessary to invoke the aid of the superintendence section in the Government of India Act, 1915, though it seems to have been held in *Kedar Nath, In re* (2), that this was one way of questioning orders in this Court. There is no decision binding upon me and I prefer the view taken in *Bavu Sahib v. District Judge of Madura* (3), where the High Court interfered in revision in a similar case. The matter has been very fully discussed in *Hari Charan Sarkar v. District Judge of Dacca* (4), where it was held that the revisional jurisdiction could only be entertained in the furtherance of justice. These being the general considerations applicable, I now come to the particular case of each applicant before me. In the cases of Rup Chand, Iftikhar Husain and Abdul Karim there was ample evidence to justify the order. They were constantly seen to be taking clients about, one of them had taken away one case from one of the witnesses, they had been seen to stop clients, hold them in conversation and apparently take charge of them. The evidence as to their general reputation was very strong. It was urged on behalf of Rup Chand, and I think one

1. (1899) 21 All 181.

2. (1903) 31 All 59=1 I C 143=2 Cr L J 59

3. (1903) 26 Mad 596.

4. (1910) 11 Cr L J 320=6 I C 327.

of the others, that the Judge had erred in refusing to send for files of cases which would have shown that they were legitimately engaged in litigation in which they are members of their family were interested. This might be so, but it would not negative or prove anything inconsistent with the other evidence called against them. The learned Judge was no doubt pressed for time to conclude inquiry before going on leave. He took the right view in assuming that these files would prove what they were alleged to show and that it was superfluous to prove them strictly, because they would not alter his view. I see no reason to interfere with the decision in the case of these three applicants and I therefore dismiss their applications. The cases of Nisar Ahmad and Abdul Rahim stand upon a somewhat different footing. I have felt some doubt as to whether I ought to interfere even in their cases. I am not prepared to overrule the findings of the learned Judge on a question of fact of this kind even if I had the power to do so, and it may be that I am stretching the powers of this Court in revision somewhat by interfering at all. I only do so because the evidence as recorded in the Judge's note in these two cases is not very strong, and the Judge being admittedly pressed for time and having given reasons in their cases which are not entirely satisfactory, it is just possible that they may have suffered injustice by being, so to speak, swept away in the general current against their co-defendants.

Abdur Rahim had been in the employment for one year of Mr. Abdul Bari, a Barrister against whom the complainants made no suggestion, but who had been temporarily absent from Meerut. Those who mentioned Abdur Rahim said very little about him. Muhammad Husain in cross examination (see p. 58 of the Judge's English notes) really spoke in his favour and mentioned that he had returned to Mr. Abdul Bari's employment. Gauri Prasad said little or nothing about him. Ghasi Ram (see p. 21 of the English notes) mistook him altogether for another. As to Nisar Ahmad two pleaders were called for the defence. One with over three years' experience spoke of him as being regularly in the employment, and constantly being seen in the company of Mr. Zamirul Islam, his employer. Mr.

1918 A/35 & 36

Abdullah Shah had nothing to suggest against the latter (see p. 6). Bahal Singh and Ghasi Ram certainly gave positive evidence about his holding clients. Ramji Lal (pp. 36-37) on the whole spoke in his favour. In these two cases the learned Judge's reason, namely, that the evidence did not warrant him in rejecting the considered complaint of the Bar Association is not quite satisfactory. He must form an independent view of his own, though no doubt the opinion of the Bar Association on a matter of general reputation is entitled to very great weight.

I am not deciding that his conclusion was wrong. It is a question of fact of which he is a better Judge than I. I merely hold that these two applicants have made out a case for further consideration and I remit their cases to the learned Judge for consideration and for such final order thereon as he, on hearing any further evidence on either side or of the men themselves, sees fit to make. He can, of course, take into account the evidence already given. And in the exercise of my discretion I leave it to the learned Judge to decide whether in the cases of these men he will suspend the operation of the list until he is able to take up the further inquiry. Further than this I decline to interfere. The last case is the case of Kalka Prasad. This case has caused me some difficulty. The applicant was put upon a list in 1908 by the then District Judge of Meerut, the list which gave rise to the decision in *Kedar Nath*, In re, (2). The District Judge reports that he has repeatedly applied to have his name removed as it was impeding his chances of obtaining work in Delhi, but the District Judge, of course, had no material on which to act. The applicant, undoubtedly, wrote to the Court on 9th February of this year and received what I may accept as an official reply that no list of touts was then affixed. According to the learned Judge it was also not affixed from the long vacation of 1916 and afterwards. It is clear that the list ought to be exhibited. I think sub-S. 3 means that the exhibition of the copy-list, there referred to, is necessary to constitute a man a proclaimed tout, though it is not necessary for me to decide that point in this case. But upon further consideration, I have come to the conclusion that the mere removal

or failure to keep the list exhibited in the Court of the District Judge of Meerut had not the effect of cancelling the list altogether, inasmuch as it was by the order to be exhibited in all Courts subordinate to the District Court, and its mere removal in one Court out of many would not per se cancel the original order of 1908.

The form however adopted by the learned Judge in this particular case has caused some embarrassment. He might have made a further list supplementary to the existing list of 1908 and merely ordered his officials to restore the list of 1908 to the place from which it should not have been removed. In that event the applicant would have had no grievance. As it is, he has the grievance, technical though it may be, that his name has been included in a new list consisting of the old list and the new names added thereto by the order of 4th May, and before that was done he was given no opportunity of showing cause. In this case again I decline in my discretion to interfere. Though the applicant's name would not be properly upon the new list and ought to be removed, it is not improperly upon the old list. The section gives the Judge the power, from time to time, to alter and amend the list and under the circumstances, inasmuch as the present applicant is desirous of being heard and may be able to satisfy the learned Judge that if he had been given an opportunity of showing cause his name would not have been included in the list of 4th May. I think the learned Judge might well allow an application by Kalka Prasad, if he sees fit to make it, to have the list altered or amended by the removal of his name, on the ground that whatever may have been the case in 1908 he is no longer a tout. The result is, though feeling some doubt in the matter, that I dismiss the application of Kalka Prasad.

V.B./R.K. *Application dismissed.*

A. I. R. 1918 Allahabad 274

TUDBALL AND ABDUL RAOOF, JJ.

Kali Charan Pande and others—Plaintiffs—Applicants.

v.

Gupt Nath Misra and others—Defendants—Opposite Parties.

Civil Revn. No. 183 of 1917, Decided on 19th March 1918.

Civil P.C. (1908), Sch. 2, Paras. 14 and 15—Evidence recorded by six arbitrators—Two arbitrators withdrawing before decision—Remaining arbitrators after notice to defendants but in their absence recording fresh evidence and giving award—Award is invalid.

The parties to a dispute referred it to six arbitrators agreeing that the verdict should be, if necessary, the verdict of the majority. The arbitrators recorded the evidence of the parties, but no decision was arrived at. Thereupon two of the arbitrators withdrew, and the remaining arbitrators, after notice to the defendants but in their absence, recorded afresh the evidence offered by the plaintiffs and gave an award:

Held: that the award, being based upon fresh proceedings and fresh evidence taken by four out of six arbitrators, was invalid and illegal.

[P 275 C 1]

Uma Shankar Bajpai—for Applicants.

Kailas Nath Katju—for Opposite Parties.

Judgment.—This is an application in revision arising out of arbitration proceedings. The facts briefly are as follows: The parties to the dispute agreed to settle it by arbitration (out of Court). There was no suit pending. They referred their dispute to six arbitrators agreeing that the verdict should be, if necessary, the verdict of the majority. The arbitrators met on 10th February 1915. The parties produced evidence which was recorded. The arbitrators again met on 19th or 20th February. They discussed the matter and apparently were soon divided into two groups in the opinions they expressed. No decision was arrived at; no award was drawn up. Two of the arbitrators withdrew from the arbitration and sent in notice to that effect. Thereupon the remaining four arbitrators again met on 21st March. Prior to that date notice was issued to the parties for that and was also sent to the defendants and their arbitrators. On that date the four arbitrators proceeded to take all evidence afresh that the plaintiffs offered. The defendants were not present nor were their witnesses. One fact has to be noted, and that is that after the meeting of 19th or 20th February, one of the two arbitrators who withdrew, took away with him the record of the evidence which had been taken on 10th February. On the 21st March, the four arbitrators after recording the evidence of the plaintiffs' witnesses on that date drew up an award and signed it. It was this award which the plaintiffs put forward in Court that it should be filed and a decree passed upon it. The Court of first instance granted the application.

The lower appellate Court held that this award, on the face of it and upon the facts stated, was an illegal award and set aside the order of the first Court. It seems to us in the first place that the order of the Court below was correct. The award of 21st March was not an award within the intention of the parties. It was based upon fresh proceedings and fresh evidence taken by four out of six arbitrators and it was not an award based upon the proceedings of 10th February and 19th or 20th February. We can find no ground whatsoever for revision. The Court below was entitled to go into the matter and to see whether any of the grounds mentioned in paras. 14 and 15, Sch. 2, Civil P. C., were proved. It went into the facts and held, as we have mentioned above, that the award was invalid and set aside the order of the first Court. We cannot find that the Court below acted illegally or with material irregularity in the circumstances of this case. There is, therefore, no force in the application. It is dismissed with costs.

V.B./R.K. *Application dismissed.*

A. I. R. 1918 Allahabad 275

WALSH, J.

Bisheshar Nath—Applicant

v.

Emperor—Opposite Party.

Civil Revn. No. 178 of 1917 Decided on 19th December 1917 against order of Munsif, Ghaziabad, D/- 14th, July 1917.

(a) Civil P. C., (1908), O. 6, R. 14—Plaint signed by prisoner in contravention of jail regulations is as good as any other plaint.

A plaint signed or a suit authorized by a man in jail is just as good as any other suit or plaint, although the plaintiff in signing the plaint or authorizing the suit contravenes some of the provisions of the Jail Manual. [P 276 O 2]

(b) Legal Practitioner—Breach of professional etiquette while conducting case—Matter calling for disciplinary powers—Court should first decide merits of case reserving such question for further consideration after disposal of case.

Where a Court has reason to think that there has been any breach of professional etiquette or any matter calling for the exercise of disciplinary powers in the conduct of a pleader or Advocate in a case, the proper course is to decide the merits and reserve any such question for further consideration after the disposal of the suit. [P 277 O 2]

Moti Lal Nehru, Tej Bahadur Sapru, S. C. Mukerji and Gulzari Lal—for Applicant.

A. E. Ryves—for the Crown.

Judgment.—These are two applica-

tions by Bisheshar Nath, High Court vakil, practising at Ghaziabad, against an order of the Munsif of Ghaziabad which was really a judgment in a civil suit, (a) directing him to show cause why he should not be committed to the criminal Court under S. 476, Criminal P. C., and also (b) directing him to show cause why proceedings should not be taken against him under S. 14, Legal Practitioners Act. The circumstances of the case are unusual, and it is to be hoped exceptional. I have had the advantage of reading an English translation of the entire pleadings, order-sheet, and evidence. A suit was brought in the Court of the Munsif by one Chajju Mal against Jasram upon a promissory note alleged to have been given by the defendant on 31st December 1913 for Rs. 150 with interest at Re. 1-4 per cent. per mensem. The claim was for Rs. 216-14-0 only. The plaint was filed about 22nd December 1916 and the claim would therefore have been barred in a few days. Para. 2 of the written statement alleged that the plaintiff was in jail, that the suit had not been presented on his behalf and that the permission of the jail authorities had not been given to the plaintiff's signature. The following issue was framed:

1. Whether the suit was properly and duly filed on behalf of the plaintiff and is maintainable or not. The Munsif describes it as the most important issue in the case.

Bakhtawar Singh, brother in law of the plaintiff, was called and swore that he was asked by the plaintiff's wife, in consequence of a letter written by the plaintiff from jail, to file the suit, and he accordingly instructed the applicant, Bisheshar Nath. Hardwari Lal, the plaintiff's munim called by the defendant attempted to identify the plaintiff's signature but he was not certain about it. A jailor was called by the defendant who contradicted the statement of Bakhtawar Singh that the plaint was signed by the plaintiff in the presence of the jail authorities, though he stated that, about the date in question, two or three people called to see Chajju Ram who was at work outside the jail, and the signature might have been obtained in the jailor's absence. The learned Munsif is incorrect in saying that the jailor swore no person had any interview with the plaintiff in the month of December.

These witnesses, whose evidence was recorded on 14th February and 13th April, are the only relevant ones upon the point as to the manner in which the plaintiff's signature was obtained. On 19th April the plaintiff himself was put into the box and was asked the question, "who signed the plaint in this case?" After a highly technical discussion about the onus of proof, which I confess is beyond my comprehension, the question was disallowed. So that issue 1 was decided after the deliberate refusal to hear the evidence of the principal person concerned who was in a position to speak to it. To talk of forgery under such circumstances is of course out of the question. I will assume that the plaintiff's signature was appended so as to constitute a breach of the jail regulations.

I will assume further, though it is by no means proved, that he did not write it himself, although he had authorized the suit, and that although he might have authorized some one to sign his own name he was prepared, or badly advised under a mistaken fear of the consequences of telling the truth to commit perjury by swearing that a signature written by some one for him was written by himself. There is not, so far as I can see, in the absence of a repudiation of his signature by the plaintiff himself a scrap of evidence of forgery, and not a shadow of a suggestion in the evidence that the present applicant knew it was forged.

The learned Munsif appears to have felt the difficulty himself. He says the signatures of the plaintiff to the plaint and vakalatnama were "most probably forged." He further concludes that the applicant was guilty of gross negligence in not concluding that there had been a breach of the jail regulations. It is impossible to reconcile this finding with the ultimate conclusion that the applicant produced two documents in Court which he either knew or had reason to believe were forged. Without considering whether the Munsif had jurisdiction to deal with any disciplinary question under the Legal Practitioners Act, or whether the occasion was one in which in any event, he ought to have exercised the power given by S. 476, Criminal P.C., I hold that on the evidence before him the course which the Munsif took with the vakil, the present applicant, had no foundation in fact and was an unwarrantable abuse of his power,

and an irregular exercise of jurisdiction. As however the judgment in this case raises several points of practical importance and the whole proceedings evidence a lamentable waste of judicial time and a fruitless expenditure of costs, all of which apparently will fall upon one or another of these two unfortunate litigants, I think it desirable to deal with the other points raised. The Munsif has entered into a learned and exhaustive examination of the Jail Manual and Regulations. These are wholly irrelevant. He says they have the force of law. This does not mean that they alter the general law. A plaint signed or a suit authorized, by a man in jail is just as good as any other plaint or suit, however many jail regulations are broken. The breach of regulations, whether by the prisoner, his friends or pleader are matters for the jail authorities or the Local Government or whoever has the duty of enforcing them or punishing their breach. They no doubt have the force of law but they cannot destroy a cause of action, or invalidate a plaint. The second part of the second plea in the written statement which raised this point ought to have been struck out and no issue should have been framed thereon.

Order 6, R. 14, which requires a pleading to be signed by a party is merely a matter of procedure. It is the business of the Court to see that this provision is carried out. It is also the business of the Court to see that a suit is authorized by the plaintiff. Of course if it is not, the suit ought to be dismissed, and the persons responsible for it made to answer for their conduct. The authority for the bringing of a suit is a question of principle. But where a suit is duly authorized, the proper signing of the plaint is a matter of practice only and if a mistake or omission has been made, it may be amended at any time. Ss. 151 and 153, which the Courts below seem too often to ignore, were plainly intended for such cases. And the latter part of O. 6, R. 14, enabling a person duly authorized by the party, when the party is unable to sign the pleading himself, to sign for him makes this clear. In the present case I see no reason why Bakhtawar Singh could not have signed for the plaintiff. I delivered a judgment recently myself upon this very point where I endeavoured to make it clear. But there is abundant authority if any were required for such

an obvious proposition. *Basdeo v. John Smidt* (1) decided it in this Court many years ago. But the most unfortunate incident of the whole case is the proceeding of 19th April when the plaintiff presented himself in the box, and the Munsif disallowed a most obvious, necessary and proper question. Why the Munsif did not then realise the position, and put an end to further waste of time and invite the plaintiff to sign the plaint and vakalatnama then and there I am at a loss to understand. The fact that a fresh suit would probably be barred by limitation would seem an additional reason for doing so. I have not thought it necessary to discuss the high technicalities about the attestation of the vakalatnama. All defects might and ought to have been cured by the exercise of a little common sense, and may, in my opinion, still be cured if the suit is remanded or the Court which hears the suit in appeal does what the Munsif might and ought to have done: vide *Rajit Ram v. Katesar Nath* (2). It cannot be impressed too often upon the inferior Courts that as Bowen L. J., said in *Cropper v. Smith* (3):

"The object of Courts is to decide the rights of parties, and not to punish them for mistakes which they make in the conduct of their cases, by deciding otherwise than in accordance with their rights. Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy."

Of course where it is sought to abuse the process of the Court, or to overreach the other party by some fraud, it is another matter. I have thought it necessary to refer to some of the broader questions raised by this case, and to reiterate these time-honoured principles, because in my short experience I have found from time to time a good deal of misconception and confusion of thought with regard to these matters in the procedure of inferior Courts. They cannot be impressed too strongly upon Courts of Justice. The suit is not before me and is, I understand, under appeal before the District Judge of Meerut, who has postponed the hearing pending these applications. It is to be observed however that although according to the Munsif's judgment the defendant admitted his signature to the notes so that the onus was upon him, the plaintiff gave evidence and the defendant did nothing

but rely upon a discharged servant of the plaintiff. The Munsif dismissed the suit on the merits. If he was right in so doing there was the less reason for this elaborate expenditure of time and money over a trivial matter of Rs. 200. The appellant alleges that there have been private and personal differences between himself and the Judge. Except that his judgment is under review, the Munsif is not before me. I have not heard what he has to say and I will merely content myself by saying that if there has been anything of the kind, the Munsif and the vakil should lose no time in healing the sore and making friends. Both are members of the same profession, and where illfeeling prevails work is certain to suffer. The Government Advocate is probably right in saying that the parties have, for some reason best known to themselves, expended a great deal of unnecessary heat over this little suit.

The defendant and his representatives are partly to blame for this unfortunate miscarriage by having raised the question in their plea, apparently because the plaintiff, who was a former employer of the defendant, had been sent to jail. If there was a good defence to the suit, it was superfluous. If there was no defence, it was irrelevant to any question unless the suit had not been authorized by the plaintiff. This which is the sole question of importance, has not been decided at all. I will merely add that it would in my opinion be better, as a general rule, where the Court has reason to think that there has been any breach of professional etiquette or any matter calling for the exercise of disciplinary powers, in the conduct of the pleader or advocate in the case, to decide the merits, and reserve any such question for further consideration after the disposal of the suit. If there were no other reason for this course, and there are several in my judgment, it is in any case not a matter which concerns the parties or one in respect of which they ought to be penalised either by prolonging the suit or increasing the costs. This case seems to have occupied the time of the Court on six days, including the framing of the issues and the delivery of judgment, and lasted for more than six months. I direct the order of the Munsif so far as it affects the applicant, to be cancelled.

V.B./R.K.

Order cancelled.

1. (1900) 22 All 55.

2. (1896) 18 All 896.

3. (1884) 26 Ch D 710.

A. I. R. 1918 Allahabad 278

TUDBALL AND ABDUL RAOOF, JJ.
Deodatt Singh—Plaintiff—Appellant.
 v.

Ram Charittar Jati — Defendant — Respondent.

Second Appeal No. 492 of 1916, Decided on 11th May 1918, from decree of Dist.-Judge, Ghazipur.

Civil P. C. (1908), S. 11—Mortgage of muafi zabti sarkari—Sale in execution of mortgage decree, mortgagor being proprietor—Revenue papers describing him as tenant—Mortgagee-auction-purchaser obtaining formal possession—Application for mutation rejected—Suit for possession—Mortgagor is precluded from pleading that his interest was not saleable.

A muafi sarkari owned by *D* having been resumed by Government became muafi zabti sarkari. *D* sold half of it while the other half passed to his heir the defendant, who sold half of his own share and mortgaged the other half to the plaintiff. *D*'s interest in the land being admittedly that of a proprietor, the plaintiff brought a suit against the defendant on the mortgage and obtained a decree for sale. In execution, the defendant pleaded that the property was ancestral; it was therefore, sold by the Collector and purchased by the plaintiff. The defendant was not recorded in the khewat as proprietor of the mortgaged land but as tenant, the entry being 'sirkhud.' The plaintiff having obtained formal possession of the land applied to the Revenue Court for the removal of the defendant's name and for the entry of his own name in the jamabandi. The defendant pleaded that the land being his *sir* he had acquired an exproprietary interest as tenant therein. The Revenue Court rejected the plaintiff's application, whereupon the plaintiff brought a suit asking for a decree for maintenance of possession or in the alternative for recovery of possession. The defendant pleaded that his original interest in the land was that of an occupancy tenant, that that interest was not transferable and that the plaintiff acquired no title by the sale.

Held: that the defendant's plea, that his original interest in the land was not saleable according to law, ought to have been raised in the course of the previous civil suit on the basis of the mortgage, and that not having raised it then he was precluded from raising it in the present suit. [P 279 C 1]

M. L. Agarwala—for Appellant.

Janki Prasad—for Respondent.

Judgment.—This is a plaintiff's appeal and the facts out of which it has arisen are as follows: One Din Dayal was the owner of 47 bighas 9 biswas muafi sarkari in the village in question. This revenue-free holding was resumed by Government and it became what is called muafi zabti sarkari. On 31st March 1887, Din Dayal sold half to Sheo Harak. Sheo Harak sold this to Jagdeo. The other half passed to the heir of Din Dayal, namely, the defendant-respondent Ram

Charittar. He sold one-half of this half to the plaintiff on 29th September 1907, and he mortgaged the other half to the plaintiff. It is admitted before us that Din Dayal claimed a proprietary interest in the land. The plaintiff brought a suit upon his mortgage and obtained a decree for sale. He applied in execution for sale of the property. Ram Charittar pleaded that the property was ancestral and that it ought to be sold through the Collector. His plea was successful and the decree was transferred for execution to the Collector; the property was sold and purchased by the plaintiff and the decree entered as satisfied. The plaintiff then applied for and obtained formal delivery of possession. Then the plaintiff's difficulty arose.

The proprietary interest which was mortgaged and sold was not recorded in the khewat but in the khatauni jamabandi. Ram Charittar was recorded as in possession of the land in the capacity of a tenant, the entry being in the words "sir khud." The plaintiff applied to the Revenue Court for the removal of Ram Charittar's name and the entry of his name in place thereof in the jamabandi. Ram Charittar pleaded in defence that the land was his *sir* land, that he had acquired an exproprietary right as tenant therein, and that his name should remain recorded. The Revenue Court came to the conclusion that the original interest of Ram Charittar in the land was that of a tenant with occupancy rights. It accordingly rejected the plaintiff's application, whereupon the plaintiff brought the present suit in which he asks for a decree for maintenance of possession or in the alternative, for possession if he be found not to be in possession. The Court of first instance gave the plaintiff a decree for possession as an auction-purchaser of resumed muafi land as entered in the relief and declared that the decision of the Revenue Court was invalid and not binding upon the plaintiff. In para. 1 of the plaint the plaintiff stated as follows:

"The defendant is a hereditary muafidar of the resumed muafi land situated in Mauza Banjri, parganah Bhadaon, granted by the Government. He has been, and such, in possession of the same."

This was clearly an allegation of proprietary interest. In para. 1 of the written statement the defendant replied as follows:

"The particulars set forth in para. 1 of the plaint are admitted."

In para. 5 of the written statement, however, the defendant pleaded that his original interest in the land was that of an occupancy tenant, that that interest was not transferable, hence the plaintiff by the sale acquired no title whatsoever. His claim for possession of the land was improper and should be dismissed. In para. 6, however, he pleaded in the alternative that if according to the plaintiff's allegation (which he had made in para 1 of his written statement already admitted to be correct) the land claimed was muafi, then it was his (the defendant's) *sir* land and he by reason of a subsequent sale had acquired the interest of an exproprietary tenant therein and that therefore he was not liable to ejectment in the suit as brought by the plaintiff. The Court of first instance held that the defendant had a proprietary interest in the land and that the decision of the Revenue Court in mutation proceedings was wrong and it gave the plaintiff a decree, as we have stated above, for proprietary possession as auction-purchaser.

The defendant appealed. He again pleaded in the alternative: (1) that his right was not saleable under the law, and secondly, that if he had had a saleable right then he was an exproprietary tenant and as such not liable to ejectment from the land by this suit. His appeal was allowed. The plaintiff appeals. The first plea taken, and it has considerable force, is that it is not now open to the defendant to raise the plea that his original interest in this land was not saleable according to law; that this was a plea which, if he wished to raise, he ought to have raised in the course of the previous civil suit on the basis of the mortgage; that he at no time raised it, not even in execution proceedings, and that it is no longer open to him to raise it. We think that this is correct. Mr. Janaki Prasad on behalf of the defendant-respondent also states that the position which he takes up on behalf of his client is that his client's interest in this land was a proprietary interest; that it was his client's *sir* land and that he now holds the land with the right of an exproprietary tenant and as such is liable to pay rent but not to ejectment in the present suit. The Court below has come to a finding that the defendant was originally

an occupancy tenant of this land, that he had no transferable right and that the plaintiff acquired no title by the decree and the sale thereunder. It has given no reason whatsoever for its decision. In view of the plea taken up before us that it is no longer open to the defendant to raise this plea (and this we think is a good plea) and also in view of the position taken up by the defendant-respondent's counsel in the case, the decision in this suit must go upon the assumption that the defendant's original interest in the land was a proprietary interest which was mortgaged, sold in execution of the decree and purchased by the plaintiff. Therefore it simply remains to be seen whether the defendant's claim to be an exproprietary tenant is a good one. That will depend upon the question as to whether the land in suit was the defendant's *sir* land at the time that the sale took place. We therefore remit to the Court below the following issue:

Assuming that the defendant's original right was a proprietary interest at the date of the sale and purchase by the plaintiff, was this land the defendant's *sir* within the meaning of the law? The parties will be allowed to give fresh evidence on this issue. We allow ten days on receipt of the findings for filing objections.

Final Judgment.—The finding of the Court is that the land in dispute has not been proved to be the defendant's *sir* within the meaning of the law. No objection has been filed. The result therefore is that the appeal must succeed. We allow the appeal, set aside the decree of the lower appellate Court and restore the decree of the Court of first instance. The plaintiff will receive his costs throughout.

V.B./R.K.

Appeal allowed.

A. I. R. 1918 Allahabad 279

PIGGOTT AND WALSH, JJ.

Ram Dass—Applicant.

v.

Emperor—Opposite Party.

Criminal Ref. No 977 of 1917, Decided on 11th January 1918, Reference made by Sess. Judge, Ghazipur.

Criminal P. C. (1898), Ss. 350 and 537—S. 350 covers cases of transfers as well as those in which Court remains same but person of presiding officer is changed—Judgment pronounced on evidence of another

Magistrate—Irregularity is cured by S. 537 in absence of failure of justice.

Section 350 applies as much to cases in which a Magistrate ceases to exercise jurisdiction by reason of the transfer of the case to another Court as to cases in which the Magistrate ceases to exercise jurisdiction by reason of his own death or transfer to another post. In other words, the section covers cases of transfer as well as those cases in which the Court remains the same but the person of the presiding officer is changed. [P 281 C 1]

A complaint filed against the accused was referred for trial to a Second Class Magistrate who recorded the whole of the prosecution evidence and a portion of the evidence for defence. The accused then applied to the District Magistrate for transfer on the express undertaking that in the event of transfer he would be satisfied if the Court to which the transfer was made pronounced judgment after recording the evidence of the remaining defence witnesses. The District Magistrate transferred the case to a First Class Magistrate with the direction to proceed with the trial from the stage which it had reached in the Court of the Second Class Magistrate. The accused did not claim that the evidence should be recorded de novo and the First Class Magistrate passed sentence upon him after recording the rest of the defence evidence:

Held: (1) that inasmuch as the accused did not demand that any of the witnesses should be re-summoned and re-heard, proviso (a), Cl. (1), S. 350, did not apply and could not be relied upon in support of an application for revision: [P 281 C 2; P 282 C 1]

(2) Per *Walsh, J.* that even if the Magistrate committed an irregularity it was curable by S. 537 in the absence of circumstances showing a failure of justice. [P 282 C 1]

Peary Lal Banerji, K. N. Laghate Janaki Prasad and Kamla Kant Varma—for Applicant.

Uma Shankar Bajpai—for the Crown.

Piggott, J.—The case before us is a reference by the learned Sessions Judge of Ghazipore recommending that the conviction of one Ram Das on a charge under S. 323, I. P. C., and the sentence of rigorous imprisonment for one month passed on him be set aside on the ground that the trial in the Magistrate's Court was vitiated by illegality. It appears that the complaint filed against Ram Das was referred for trial to the Court of an Honorary Magistrate exercising the powers of a Magistrate of the Second Class. This Court recorded the whole of the evidence for the prosecution and a portion of the evidence for the defence. When it had reached this stage, Ram Das applied to the District Magistrate to have the case transferred to some other Court. He gave an undertaking that in the event of such transfer he would not ask the Court

to which the transfer was made to re-hear the entire evidence de novo but would be satisfied if that Court proceeded to call and examine the remainder of the defence witnesses and pronounce judgment on the materials then before it. The case was then transferred by the District Magistrate to the Court of a stipendiary Magistrate of the First Class. Ram Das made no attempt to evade the undertaking which he had given to the District Magistrate, that is to say, he did not demand that the witnesses or any of them who had been already examined by the original trial Court should be re-summoned and re-heard. The First Class Magistrate accordingly heard and examined the remainder of the defence witnesses named on behalf of Ram Das, convicted him on the charge as framed under S. 323, I. P. C. and sentenced him to rigorous imprisonment for one month. The learned Sessions Judge has referred the case to this Court on the ground that the provisions of S. 350, Criminal P. C. do not apply to cases which are transferred from one Court to another and that the First Class Magistrate on receiving this case for trial was bound to commence the trial de novo by the examination of all the prosecution witnesses. There is authority for this proposition in one single case of this Court *Queen-Empress v. Angnu* (1). That case was decided by a single Judge upon a reference by a Sessions Judge. The case was not argued and the judgment is of the briefest. We can only take it that in the opinion of the learned Judge of this Court who disposed of that reference the provisions of S. 350, Criminal P. C., were not intended to apply to cases of transfer. There was a suggestion in the referring order in that case that the accused had been prejudiced by the course adopted.

Apparently there had been some complaint on his part against the manner in which the evidence had been recorded by the original trial Court. We do not know how far the learned Judge of this Court was affected by this consideration in passing the order which he did. The learned Sessions Judge has referred to another decision of this Court, *Queen Empress v. Bashir Khan* (2). He is entitled to rely upon the opinion expressed by the learned Judge who disposed of this case by way of

1. (1889) A W N 130.

2. (1892) 14 All 346.

obiter dictum; but the actual point for decision was different. On the facts of that case, even assuming that the provisions of S. 350, Criminal P. C., did apply, those provisions had been contravened and the order quashing the proceedings was obviously right on this ground alone. In a recent case, *Emperor v. Nanhua* (3), one of us has committed himself to a contrary view. Some stress was laid in deciding that case on the fact that the proceedings transferred from one Court to another were only an inquiry preliminary to commitment, and no doubt the question of possible prejudice to the accused person would require to be more carefully considered in the case of transfer of a trial than in the case of an inquiry preliminary to commitment. At the same time it is quite clear that either the provision of S. 350, Criminal P. C., do not apply at all to cases of transfer, or they apply to trials just as much as to preliminary inquiries. This decision is based on certain recent pronouncements of the Calcutta and Madras High Courts. It is sufficient to refer to the cases of *Mohesh Chandra Saha v. Emperor* (4), *Kudrutullah v. Emperor* (5) and *Palaniandy Gounden v. Emperor* (6). The last of these cases was also a case of an inquiry preliminary to commitment; but in this case, as well as in the two Calcutta cases, the principle was most clearly affirmed that S. 350 Criminal P. C., applied as much to cases in which a Magistrate ceases to exercise jurisdiction, so far as the particular case in question is concerned, by reason of its transfer to another Court, as to cases in which the Magistrate ceases to exercise jurisdiction by reason of his own death or transfer to another post.

It has been shown to us that the two Calcutta cases are not entirely consistent with certain prior decisions of that Court, but they do represent the latest views of that Court on the question for determination before us. On the wording of the section itself it seems impossible to deny that the words used are wide enough to cover cases of transfer, as well as those cases in which the Court remains the same, but the person of the presiding officer is changed. As the learned Judges

of the Madras High Court have pointed out, the words "ceases to exercise jurisdiction therein" must be given their appropriate meaning; and certainly a Magistrate who takes cognisance of a case on the passing of an order of transfer by a competent Court has jurisdiction "therein", that is to say, in the said case by reason of the order of transfer. On the ground of public convenience there seems to be no good reason why the words of the section should not receive a liberal interpretation, provided such interpretation is not inconsistent with the words themselves. It seems to us that there is no good reason why the practice of this Court should not be brought into conformity with that of the High Courts of Calcutta and Madras, and we are prepared to hold that the provisions of S. 350, Criminal P. C., do apply under the circumstances of the case now before us. It has been further suggested that we ought to interfere on the ground that Ram Das was prejudiced in his defence by the form of the order of transfer passed by the District Magistrate.

The learned District Magistrate would have been better advised, if he had contented himself with calling attention to the fact that his order was made largely on an undertaking by Ram Das that he would not claim his right to have all the witnesses resummoned and re-heard. He went a little further than this, and by his order of transfer purported to direct the First Class Magistrate to whose Court he transferred the case to proceed with the trial from the stage which it had reached in the Court of the Honorary Magistrate. If the applicant Ram Das had come before the First Class Magistrate and had repudiated the undertaking which he had given to the District Magistrate, and offered some explanation of his conduct in doing so, and had definitely claimed the right conferred by proviso (a) Cl. (1), S. 350, Criminal P. C., it may well be that other considerations would arise. Certainly the Magistrate who decided this case could not be bound in his judicial capacity by any direction in the order of transfer. It would have been his duty to consider the application and give such effect to it as he thought just and lawful. The fact remains, however, that Ram Das did not demand that any of the witnesses should be re-summoned and re-heard. Proviso (a) Cl. (1), S. 350

8. A I R 1914 All 45=36 All 815=29 I O 722=15 Cr L J 854.

4. (1908) 85 Cal 457=7 Cr L J 220.

5. (1912) 89 Cal 781=14 I O 814=18 Cr L J 218.

6. (1909) 82 Mad 218=1 I O 54=9 Cr L J 146.

Criminal P. C., has no application to the facts before us and cannot be relied on in support of the application.

Something has been said as regards the severity of the sentence. This point was not taken in the application to the Sessions Judge and we are not prepared to interfere on this ground, as the judgment convicting Ram Das seems to be a just and a proper one. We decline to accept the reference and order the record to be returned, the conviction and sentence to stand. If Ram Das has been released pending this reference, he must surrender to his bail and undergo the unexpired portion of his sentence.

Walsh, J.—I entirely agree. Apart from authority, I think the section is clear and too strong for the argument of the applicant in this case. Criticism has been made upon the construction of the section, but it seems to me a simple and compendious statement to cover all cases thus:

"Whenever any Magistrate ceases to exercise jurisdiction in a case and he is succeeded by another Magistrate having such jurisdiction"

(that may occur by death, promotion, retirement or transfer by a superior authority), "the Magistrate so succeeding may act on the materials already before him."

Lest it should be supposed that the accused is caught by a strict application of the technical provisions of the Statute, I want to draw attention to one or two matters to which my brother has not referred. The appellant asks for reduction of sentence, on the ground that it was too severe. He called a number of witnesses to allege that he was not there at all and on the other hand he brought a cross charge against a prosecution witness for assaulting him at the place in question. Under these circumstances, having a reasonable apprehension that he was going to be convicted, he applied for transfer. In my judgment the accused, Ram Das, got a very favourable order out of the District Magistrate and he is the one person who has no right to complain. I should want to hear considerable argument before deciding that under such circumstances in acting upon the evidence already recorded, the Magistrate committed any irregularity which could not be cured by S. 537 in the absence of circumstances showing a failure of justice. I entirely agree with my learned brother

in the order that this reference must be rejected.

V.B./R.K.

Reference rejected.

A. I. R. 1918 Allahabad 282

RICHARDS, C. J.

Girdhari and another—Applicants.

v.

Emperor—Opposite Party.

Criminal Revn. No. 776 of 1917, Decided on 9th November 1917, from order of Sess. Judge, Gorakhpur.

Penal Code (1860), S. 223—Policeman held not guilty of negligently suffering prisoner to escape.

Two policemen were conveying a prisoner from one place to another in a camel cart. The prisoner was secured by two pairs of handcuffs and a rope round the waist. He wanted to be let down from the cart to answer the call of nature and thereupon one set of handcuffs was removed and he was let down. He suddenly raised an alarm of snake and in the confusion jerked at the waist rope and ran away:

Held: that the policemen were not guilty of negligently suffering the prisoner to escape within the meaning of S. 223. [P 283 C 1]

J. M. Banerji—for Applicants.

R. Malcomson—for the Crown.

Judgment.—In this case two police constables were in charge of a dangerous prisoner whom they were conveying from one place to another in a camel cart. The charge against them is that they negligently suffered the prisoner to escape. The facts as found by the trial Court are as follows: The constables had put on their prisoner two sets of handcuffs. One set bound his hands together and by the other set he was bound to the side of the camel cart. In addition to these precautions there was a rope round the prisoner's waist. During the course of the journey the prisoner demanded to be let down from the cart to answer the call of nature. One set of handcuffs was taken off in order to enable the prisoner to leave the camel cart for the purpose mentioned. The rope remained round his waist and one set of handcuffs remained on his hands. The prisoner raised a sudden alarm of a snake and in the momentary confusion jerked away the rope and managed to get away. The night was cloudy and the prisoner could not be caught. The learned Magistrate most expressly states that there was no suggestion against the accused that they deliberately connived at the escape of their prisoner. Nevertheless the Magistrate held that the accused had been guilty of carelessness and that negligence include

carelessness and he accordingly convicted both the accused and sentenced them to six weeks' rigorous imprisonment. The accused appealed and the learned Sessions Judge held not only that the accused had been guilty of carelessness but he went on to say that they had been guilty of gross negligence and that he was inclined to think that the accused intentionally abetted the escape. I hardly think the learned Sessions Judge was entitled to make the last mentioned remark having regard to what the learned Magistrate said, namely, that it had never been suggested that the accused had connived at the escape of their prisoner. The accused furthermore were not charged with having helped the prisoner to escape. I hardly see how he could arrive at the conclusion that the accused had been guilty of gross negligence.

Dealing with the Magistrate's judgment (which I think is the fair thing to do in the circumstances of the present case), I proceed to consider whether or not the accused on the admitted facts can be said to have negligently suffered their prisoner to escape. The case is of some importance to the accused as possibly a conviction means their loss of service and disgrace. There cannot be any doubt, I think that the initial precautions taken by the accused were amply sufficient. The prisoner not only was handcuffed but he was attached to the camel cart and he had a rope round his waist. The only negligence suggested by the Magistrate is that the accused may have been half asleep and that they were thoroughly frightened at the cry of snake. To be frightened at the cry of snake may be very foolish but it is not negligence and there does not appear to be any evidence that they were half asleep. If the accused helped the prisoner to escape they should have been charged with this offence. If it was alleged that they had been guilty of negligence the latter had to be proved. If they had merely shown themselves to be somewhat inefficient policemen the matter should have been dealt with departmentally. I allow the application set aside the convictions and acquit the two accused of the offence with which they are charged. Their bail bonds will be discharged.

V.B./R.K. *Application allowed.*

A. I. R. 1918 Allahabad 283

BANERJI AND PIGGOTT, JJ.

Gauri Shankar—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 41 of 1918, Decided on 28th January 1918, from order of Sess. Judge, Cawnpore.

Penal Code (1860), S. 302 — Death caused by arsenic—Offence is murder.

Accused administered arsenic to a boy of nine years of age with the object of preventing the boy's father from giving evidence against the accused in a criminal trial. The boy died from the effects of the poison :

Held : that the accused was guilty of murder, inasmuch as he knew that the act committed by him was so imminently dangerous that it must in all probability cause to the boy such bodily injury as was likely to cause death.

[P 285 C 1]

E. A. Howard—for Appellant.

A. E. Ryves—for the Crown.

Judgment. — In this case Gauri Shankar Bhat, aged fifty-eight years, has been found guilty by the learned Sessions Judge of Cawnpore on a charge framed under S. 302, I. P. C., the case against him being that he caused the death of a little boy named Parmanand by arsenical poisoning. The record is before us for confirmation of the sentence of death and a petition of appeal has been presented by Gauri Shankar through the Superintendent of the Jail in which he is confined. We have also had the advantage of hearing the case argued on behalf of the appellant by a learned advocate of this Court. The story for the prosecution is that, on 23rd September last, in the course of the forenoon, the accused asked two little boys, Parmanand and Durga, the sons of his neighbours Lala, and Jawahir Kurmis, to come to him at a certain temple in order to study. The accused's own boys were there studying their books just outside the temple. It is alleged that Gauri Shankar offered some sugar to the boys, Parmanand and Durga, taking precautions at the same time that his own sons should not receive any share of it. The boys ate the sugar on the spot and, after sometime, they were both taken ill with vomiting and purging. They were carried to the hospital and the first report was made at the police station of Derapur on 24th September at 1 p. m., that is to say, within about twenty-four hours of the occurrence.

In this report Lala, the father of the boy Parmanand, plainly accused Gauri Shankar of having given the two boys some poisonous substance in sugar. He did this on the strength of the statements made to him by the boys themselves. The boys were treated at the hospital and it was apparent that the case of the younger of the two, Parmanand, who was only about nine years of age, was the more serious, and on 24th September the statement of Parmanand was recorded by the Tahsildar Magistrate. It is to the effect already explained. It alleges that Durga and Parmanand had been sent to the temple by their mother at Gauri Shankar's instance, that they were given sugar to eat, that they complained at the time that it had a curious taste, but were encouraged by the accused to eat it, and that they were taken ill shortly afterwards. The parents of the two boys removed them from the hospital on the morning of 25th September, perhaps injudiciously so far as regards Parmanand. The result was that, while Durga recovered, Parmanand died on 26th September. The subsequent autopsy, taken in connexion with the report of the Chemical Examiner, puts it beyond doubt that death was the result of arsenical poisoning. The hospital assistant who treated both the boys gives evidence to the same effect. The symptoms observed by him were those of arsenical poisoning and he suspected arsenic from the first.

The evidence on the record is not voluminous, but it seems straight forward and reliable as far as it goes. Mt. Jasoda is able to prove that Parmanand was sent to Gauri Shankar at the temple, at the latter's express request, and that when he returned home about noon he was vomiting and soon became seriously ill. The most important evidence in the case is the statement of the boy Durga. He says that he was given sugar by the accused at the temple along with Parmanand; that they both complained of the sugar tasting bitter, but the accused reassured them, saying that there was pepper in it. There is one slight discrepancy between his statement and the dying declaration of Parmanand. According to the latter the boys were taken ill at the temple and had both of them vomited before they left it. According to Durga he was able to go away and visit

his house and another place and had also eaten two puris, before he was taken ill. On a consideration of the evidence given by Lala, the father of Parmanand, and by Jawahir, the father of Durga, it seems probable that some confusion of memory on the part of the boy Durga is responsible for the discrepancy. The evidence of Lala as to what he was told by Parmanand clearly supports the version in the dying declaration. The point however does not seem of material importance, whatever the explanation of the discrepancy may be.

There is clear evidence of motive, although it may fairly be argued on the accused's behalf that the motive is not a strong one for the commission of such an offence as murder. There was a criminal prosecution pending against Gauri Shankar and the case was down for hearing before the Tahsildar Magistrate on 24th September. Lala had been active in arranging for the prosecution and was the most important witness in the case. Jawahir, father of Durga, had also been summoned as a witness. In the result Lala was unable to attend because he was waiting upon his sick son, and the complaint was dismissed without any regular trial, the Magistrate apparently accepting a statement made to him by Gauri Shankar and not considering himself called upon to make further inquiry in the absence of the principal witness for the prosecution.

The accused sets up no defence worthy of consideration, either in the Court below or in the petition of appeal which he has addressed to us. He denies all the facts alleged against him. He says he was not in the village at all on 23rd September and that the boys never came to him at the temple. In his petition of appeal to this Court he goes so far as to suggest that the parents of the two boys were so seriously at enmity with him that they administered poison to their own children in order to get him into trouble. A defence of the sort certainly does not help the accused. The assessors, as well as the learned Sessions Judge, were satisfied that the prosecution evidence was reliable and that Gauri Shankar had certainly administered arsenic to these two boys with the intention to make them ill. We have felt called upon to consider carefully the question as to the precise nature of the offence thereby

committed by the accused. The learned Sessions Judge passes over the point somewhat lightly, with the remark that the accused must have known that he was likely to cause the death of Parmanand by giving him arsenic. The question requires to be considered somewhat more carefully with reference to the provisions of Ss. 299 and 300, I. P. C. With regard to the former of these sections, we think there can be no doubt that Gauri Shankar intended to cause bodily injury to the two boys and that the bodily injury which he intended to cause by the administration of arsenic was of a kind likely to result in death, especially in the case of a little boy about nine years of age. Further, we are quite prepared to hold that in administering arsenic to these boys he knew that he was likely thereby to cause death. When we come to consider the provisions of S. 300, Cl. (2), it becomes evident that the present case is one which lies very much on the boundary line. Somewhat similar questions have had to be considered by this Court in cases of dhatura poisoning and there has been some conflict of authority, as may be seen from the following cases: *Queen-Empress v. Tulsha* (1), *Emperor v. Bhagwan Din* (2), *Emperor v. Gutali* (3).

Each case must, of course, be decided upon its own facts, but it seems a grave matter to hold that a man of the accused's age, administering a substance like arsenic, with the effects of which the agriculturist population of Northern India is well acquainted, to a boy of Parmanand's age, and actually causing his death thereby, is to be found guilty of any offence short of murder, even though his intention at the time may not have been (and probably was not) to cause the death of the child. Taking the provisions of the section in question as applicable to the facts of the case, we think we are bound to hold that Gauri Shankar, in committing the act proved against him, knew it to be so imminently dangerous that it must in all probability cause to the boys such bodily injury as is likely to cause death. The case therefore just falls within the definition of the offence of murder. Regarding it however as a case standing very much upon the border line, and accepting, as we do, the conclusion that

the intention was not to cause the death of either of the boys, we do not think it necessary in this case to pass the severe sentence provided by law. We so far accept the appeal of Gauri Shankar that we set aside the sentence of death passed upon him, but affirm his conviction. We direct that he undergo transportation for life with effect from 2nd January 1918, the date of his conviction in the Sessions Court.

V.B./R.K.

Sentence reduced.

A. I. R. 1918 Allahabad 285

RICHARDS, C. J. AND BANERJI, J.

Ahmed Khan and others—Objectors—Appellants.

v.

Mt. Gaura—Applicant—Respondent.

First Appeal No. 72 of 1917, Decided on 3rd December 1917, from order of Second Addl. Sub-Judge, Jaunpur, D/- 20th March 1917.

(a) Civil P. C. (1908), O. 9, R. 3 and O. 34, R. 5—Application for final decree dismissed in default—Fresh application lies.

Where an application for a final decree in a mortgage suit is dismissed for default of appearance of both parties, a fresh application can be made. [P 286 C 1]

(b) Civil P. C. (1908), O. 34, R. 5—Application for final decree is not one in execution—Fresh application after dismissal of first is not revival of execution.

A final decree in a mortgage suit is a decree in the suit itself, and an application for a final decree cannot be deemed to be an application in execution. A second application therefore cannot be regarded as the revival of an application which has been disposed of. [P 286 C 1]

(c) Limitation Act (1908), Art. 181—Art. 181 governs application for final decree—Limitation runs from expiry of period fixed by preliminary decree for payment—Civil P. C. (1908), O. 34, R. 5.

The period of limitation for an application for a final decree in a mortgage suit is three years under Art. 181, Lim. Act, from the expiration of the time allowed by the decree for payment of the mortgage money. [P 286 C 1]

Iqbal Ahmed—for Appellants.

S. M. Sulaiman—for Respondent.

Judgment.—This appeal arises out of an application for a final decree in a mortgage suit. The preliminary decree was passed on 27th August 1908 and six months were allowed to the defendant to pay the mortgage money. It is stated in the petition filed by the decree-holder that no payment was made. He made an application on 26th August 1911 for a final decree under O. 34, R. 5. That application was dismissed for default on 9th April 1912. On 10th September 1912 the

1. (1899) 20 All 148.

2. (1908) 30 All 568=8 Or LJ 388.

3. (1909) 81 All 148=1 I O 765.

present application was made for a final decree. It was opposed on two grounds, first, that the order dismissing the previous application was a bar to the present application and secondly, that the application was time barred. The Court of first instance allowed the first objection and did not decide the second. It dismissed the application now made. Upon appeal the lower appellate Court disagreed with the Court of first instance and remanded the case for proceeding with the application.

So far as the first point is concerned the defendant's objection was without force, because the first application having been dismissed for default of appearance of both parties a fresh application could be made; but this second application ought to have been made within the period prescribed by the law of limitation. It is clear that the application was beyond time. The period of limitation which governs a case of this kind is three years under Art. 181, Sch. 1, Lim Act, from the date on which the right to apply accrued, that is, from the expiration of the time allowed by the decree for payment of the mortgage money. In the present case the six months expired on 27th February 1909 and as the present application was made on 10th September 1912, it was clearly beyond time. The Court below seems to have overlooked the fact that in the present Code of Civil Procedure a "final decree" in a mortgage suit is a decree in the suit itself and an application for a final decree cannot be deemed to be an application in execution. The second application cannot be regarded as a revival of an application which was disposed of. In this view the present application was clearly beyond time and ought to have been dismissed.

We accordingly allow the appeal, set aside the order of the Court below and restore the order of the Court of first instance with costs in all Courts.

V.B./R.K.

Appeal allowed.

A. I. R. 1918 Allahabad 286

RICHARDS, C. J. AND TUDBALL, J.

Sundar Kunwar — Plaintiff — Appellant.

v.

Ram Ghulam and others — Defendants — Respondents.

First Appeal No. 151 of 1916, Decided on 9th May 1918.

Pre-emption—Custom—Entry in Wajibularz—Construction—Mortgage by conditional sale—Foreclosure is not sale—Pre-emptor's right to step into shoes of mortgagee held barred.

In 1895 defendant obtained a mortgage by conditional sale of a certain property from its owner. In 1905 he obtained a decree for foreclosure which was made absolute in 1911, and shortly afterwards he obtained possession of the property. In 1914 the plaintiff instituted a suit for possession of the property by pre-emption by virtue of a custom set forth in the following clause of the wajibularz: "If a pattidar wants to transfer his share by sale or mortgage, he should do so first to another pattidar of the same thok, and in case of his refusal to the pattidar of another thok of the village;"

Held: (1) that the deed of 1895 was a "mortgage," that the plaintiff's right to step into the shoes of the mortgagee therefore arose in 1895, and that the plaintiff having failed to enforce that right could not revive it on the foreclosure of the property; [P 287 C 1]

(2) that the "sale" referred to in the wajibularz was the ordinary voluntary sale which a co-sharer makes, and that under the circumstances of the present case, although the mortgagee eventually became the owner of the property, there never was a "sale" of the nature referred to in the wajibularz so as to give rise to a right of pre-emption in favour of the plaintiff. [P 287 O 2]

Tej Bahadur Sapru and *J. M. Banerjee*—for Appellant.

B. E. O'Connor—for Respondents.

Judgment.—This appeal arises out of a suit for pre-emption. The facts may be very shortly stated. In the year 1894 the owner of the property mortgaged it. There had been two prior mortgages in 1892 and 1893. The mortgage of 1894 was a consolidation of these mortgages with a further advance. This mortgage was again consolidated by a last mortgage in the year 1895. This mortgage will be found printed at p. 9 of the respondents' book. It was in form what is called a simple mortgage, except for the last clause which provided that if the period mentioned in mortgage expired and the money had not been paid up, the document should be treated as a sale. In the year 1906 a suit was instituted on this document treating it as a mortgage by conditional sale and a decree for foreclosure was obtained. This decree was made absolute in the year 1911, and shortly after that the decree-holder mortgagee obtained possession. In the year 1914 the present suit was instituted, the plaintiff claiming to get possession of the property by virtue of a custom set forth in the wajibularzes appertaining to the various villages. The Court below dismissed the plaintiff's suit. The pre-emp-

tor has appealed. The custom as recorded in the several *wajibularzes* does not materially differ from the *wajibularz* for Mauza Patti Yakubpur. It is as follows:

"If a *pattidar* wants to transfer his share by sale or mortgage, he should do so first to another *pattidar* of the same *thok*, and in case of his refusal to the *pattidars* of another *thok* of the village. If he (the *pattidar*) wants to sell his share to a stranger by entering an excessive and fictitious price, the *pattidar* having the right of preemption shall be entitled to acquire that property on payment of the price awarded by the arbitrators appointed privately or by the Court."

We think (subject to what may be said having regard to certain authorities which have been quoted) that the question which the Court had to consider was whether or not the plaintiff proved by this record the existence of a custom which entitled him to get possession of the property under the circumstances of the present case as set forth above. We may here point out that the mortgages in the present case were made after the passing of the Transfer of Property Act. Even assuming that the mortgage of 1895 was in reality a mortgage by conditional sale as defined by S. 58. T. P. Act, it was one of the modes recognized by the Act itself by which an owner mortgages his property. If one reads again the extract from the *wajibularz*, which we have quoted above, it can hardly be doubted that the sale referred to in the *wajibularz* was the ordinary voluntary sale which a *cosharer* makes. This is clear from the language of the *wajibularz* itself. It begins by stating that if he "wishes," which we take to mean "has necessity" to sell, he must do so to another *pattidar* in the same *thok*, etc. Again the reference to price shows that the sale referred to was the voluntary sale of the *cosharer*. If he was observing the custom, the moment he wanted to sell, his duty would be to go to the other *cosharers* as recorded in the *wajibularz*. The very same remark will apply to the mortgage. If the transaction was a mortgage then his duty, if he observed the custom, was to first ask the other *cosharers* if they would take a mortgage of the property. In either case it would seem that the right of the pre-emptor in case of non-observance of the custom was to step into the shoes of the vendee in the case of a sale and in case of a mortgage to step into the shoes of the mortgagee. Now let us consider for a moment what the pre-emptor did in the

present case. He never sought to step into the shoes of the mortgagees of 1892 and 1893.

He never sought to step into the shoes of the mortgagees of 1894 and 1895. He waited until about three years after the defendant had obtained possession of the property in due course of law through the intervention of the Court, and the suit was brought something like 19 or 20 years after the latest mortgage transaction. We are perfectly satisfied that the plaintiff in the present case failed to prove by the production of these extracts from the *wajibularzes* the existence of a custom which gave him a right to get the property under these circumstances. It is true no doubt that the mortgagee eventually became the owner of the property but there never was a "sale" of the nature referred to in the *wajibularz*. A great difficulty is created in the case by the ruling of the Full Bench in the case of *Alu Prasad v. Sukhan* (1). In that case the mortgage had been made prior to the passing of the Transfer of Property Act 1882. The majority of the Court in the case no doubt held that the pre-emptor had a right of pre-mortgage when the original transaction took place, and that he had a further right of pre-emption when that mortgage ripened into a complete sale after the expiration of the period of grace which was prescribed for by the Regulation. The case was argued before that Bench on a different basis from the arguments in this Court. We think that the decision of the Court must have reference to the custom which the Court finds to exist in each case and if in the present case after considering the evidence we do not believe or do not consider a custom to be "proved" (see definition in the Evidence Act of the expression "proved") to exist which entitles the pre-emptor to get the property under the circumstances of the present case, we are not bound simply by reason of the Full Bench case to give the plaintiff a decree. We may mention here as having a distinct bearing upon the question of the existence or non-existence of such a custom a case which was decided by this Bench, namely, Second Appeal No. 252 of 1911, decided, on 7th July 1911, *Raja Ram Singh v. Paras Ram Singh* (2). In that case the custom as recorded in the *wajibul-*

1. (1881) 3 All 610.

2. (1911) 11 I O 628.

arz expressly provided for pre-emption upon ordinary sale and conditional sale. The record was as follows:

"If any cosharer wishes to sell conditionally or absolutely his share he can transfer it for the price that may be offered him by others first to a near cosharer, next to other cosharers the in patti and in case of their refusal, to his near cosharers in another patti, should they also refuse, then to others in the mahal and lastly to a stranger. If the share of any cosharer be mortgaged or sold conditionally to a stranger and he be unable to redeem, then any of the cosharers in his patti may, if the term of the mortgaged share is about to expire, pay up the money and take possession and when the mortgagor or his heir has paid the money in accordance with the condition of the deed between the original mortgagor and the cosharer with title he may enter into possession."

We were also referred to a decision of their Lordships of the Privy Council in which under circumstances very like the present the pre-emptor got a decree for pre-emption. The only question however which was argued before their Lordships of the Privy Council was one of limitation, namely, the Article of the Limitation Act which was applicable to the circumstances of the case and they simply held that Art. 120 governed that case because physical possession was an impossibility. Finding as we do in accordance with the Court of first instance that no custom was proved entitling the plaintiff under the circumstances of the present case to get the property by pre-emption we think that the decree of the Court below was quite correct. In our opinion the deed of 1895 made as it was after the passing of the Transfer of Property Act, was a "mortgage" and the plaintiff's right arose in 1895 to step into the shoes of the mortgagee.

We accordingly dismiss the appeal with costs.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1918 Allahabad 288

RICHARDS, C. J. AND BANERJI, J.
Shankar Lal—Plaintiff—Appellant.

v.

Ram Babu—Defendant—Respondent.

Second Appeal No. 770 of 1916, Decided on 7th March 1918, from decree of Dist. Judge, Agra.

Civil P. C. (1908), O. 20, R. 15—Personal representative of deceased partner is bound to give account of what has been received on behalf of partnership—Liability extends to assets received.

The personal representative of a deceased partner is bound to give an account of what has been received on behalf of the partnership, but he

will only be liable for the person he represents to the extent of the assets he receives. The mere fact that a minor representative is personally unable to give the accounts will not absolve him from the obligation of getting the accounts prepared by the persons who were conversant with what took place and what money was received and spent and who were acting either for the deceased partner during his life or for the minor and the estate of the partner after his death.

[P 289 C 1]

Where a surviving partner sued the representative of a deceased partner for accounts, alleging that a much larger sum in connexion with the partnership business was received by the deceased partner's estate than the plaintiff had received and that there would be a balance payable to him upon taking accounts :

Held : (1) that the suit was maintainable ; (2) that the proper procedure for the Court was to pass a preliminary decree directing that each party should furnish an account of what had been received and what had been spent.

[P 289 C 1]

Kailas Nath Katju and *Shiam Krishna Dar*—for Appellant.

Mangal Prasad Bhargava—for Respondent.

Judgment.—We think that both the Courts below have taken an extremely narrow and technical view of this case. It appears that one *Puran Chand* had a lease of the grass farm at Agra. He took into partnership the plaintiff. They were to provide the capital between them and to share in the profits. *Puran Chand* died. The plaintiff then instituted the present suit, alleging that he had received certain moneys and that *Puran Chand* and after his death his minor son received further money in connexion with the joint enterprise. He alleged that there was a much larger sum received by *Puran Chand's* estate than he had received and that there would be a balance payable to him upon taking accounts. He accordingly asked that the accounts should be taken. The Courts below have dismissed the suit, holding that it was not maintainable and that the minor could not be liable to render accounts. It seems to us (assuming the plaintiff's allegation to be true) that it would have been a very right and proper thing that the minor should have been ordered to render an account of the moneys received by *Puran Chand* or after his death by his estate in respect of the enterprise. It is said that he (the plaintiff) ought to have claimed a definite sum. It is only after he knew what had been received by the other side and what expenses had been incurred that he would

be in a position to name the sum that ought to be paid to him.

The learned District Judge says that it will be most unfair that the plaintiff should escape rendering an account whilst the other side was ordered to render accounts. We cannot understand what there was to prevent the Courts below, if it was objected on behalf of the minor defendant that it was not admitted that the plaintiff had only received the sum he alleged, to have directed that he also should furnish an account of what he had received and what he had expended. We think that the personal representative of a deceased partner is bound to give an account of what has been received on behalf of the partnership. Of course the personal representative will only be liable for the person he represents, to the extent of the assets he receives. What we think the Court below ought to have done was to have passed the preliminary decree directing that each party should furnish an account of what has been received and what has been spent. These accounts after they have been filed can be accepted or objected to in the ordinary way and dealt with by the Court. It may be objected that the minor is unable to give the accounts. The mere fact that he is personally unable to give the accounts will not absolve him from the obligation of getting the accounts prepared by the persons who were conversant with what took place and what money was received and spent and who were acting either for Puran Chand during his life or for the minor and the estate of Puran Chand after his death. We allow the appeal, set aside the decree of both the Courts below and remanded the case to the Court of first instance, through the lower appellate Court, with directions to re-admit the suit in its original number and to proceed to deal with the same having regard to what we have said above. The Court can deal with the case as near as possible on the lines of the provisions of O. 20, R. 15, Civil P. C., making a preliminary decree for an account. Costs here and heretofore will be costs in the cause.

V.B./R.K.

Case remanded.

A. I. R. 1918 Allahabad 289

RICHARDS, C. J. AND BANERJI, J.

Ram Lakhan Das and others—Decree-holders—Appellants.

v.

Shankar Singh and others—Judgment-debtors—Respondents.

Execution Second Appeal No. 851 of 1917 Decided on 4th December 1917, against decree of Addl. Judge, Gorakhpur, D/- 4th April 1917.

Limitation Act (9 of 1908), Art. 182—Application for final decree—Minor defendant not properly described—Defect does not prevent saving limitation.

A mortgage decree was obtained against a number of persons, one of whom was a minor, his guardian being one of the adult defendants. In an application for execution of the decree, in which all the defendants were named, the minor and his guardian were not described as such :

Held : that the application was one in accordance with law within the meaning of Art. 182, Sch. 1, Lim. Act. [P 289 C 2]

Haribans Sahai—for Appellants.

Iswar Saran—for Respondents.

Judgment.—The point for decision in this case is a very short one. A mortgage decree was obtained against a number of persons one of whom was a minor, his guardian being one of the adult defendants. An application was made for execution, in which all the defendants were named but the minor defendant was not described as a minor nor was the adult (who in fact has been his guardian ad litem) described as such. If notwithstanding that defect, that application can be said to be an application for execution "in accordance with law," admittedly the present application is within time and is not barred by limitation. Notice of the first application to which we have referred was issued to all the persons mentioned in the application, including of course the guardian of the minor although he was not described as guardian. We think that this application was an application "in accordance with law," within the meaning of Art. 182. We accordingly allow the appeal, set aside the order of the Court below and restore the order of the Court of first instance with costs in both Courts.

V.B./R.K.

Appeal allowed.

A. I. R. 1918 Allahabad 290 (1)

BANERJI AND TUDBALL, JJ.

Har Prasad—Petitioner.

v.

Tajammul Husain and others — Opposite Parties.

Civil Misc. Ref. No. 285 of 1917, Decided on 20th February 1918, Reference from Commissioner, Rohilkhand Divn.

Agra Tenancy Act (1901), Ss. 177 and 198—Suit for ejectment—Tenant denying plaintiff's proprietary title—Suit dismissed—Appeal lies to District Judge.

In a suit for ejectment in the Court of a First Class Assistant Collector, on the allegation that the defendants were the plaintiff's tenants without rights of occupancy, the defendants denied the title of the plaintiff, alleging that they were lessees from other persons and that the plaintiff had no right to sue them. The Court of first instance dismissed the suit :

Held : that the defendants' plea raised a question of proprietary title and as it was in issue in the Court of first instance and was also a matter in issue in appeal, the appeal lay to the District Judge under the provisions of S. 177, Agra Tenancy Act. [P 290 C 2]

Surendra Nath Sen—for Petitioner.*Raza Ali*—for Opposite Parties.

Judgment.—This is a reference under S. 195, Agra Tenancy Act. The point for consideration is whether an appeal in the case lay to the District Judge or to the Commissioner. The suit was one for ejectment on the allegation that the defendants were the plaintiff's tenants without rights of occupancy. The defendants denied the title of the plaintiff and asserted that the relation of landlord and tenant did not subsist between the plaintiff and themselves. The Court of first instance dismissed the suit holding that the plaintiff was not entitled to maintain it in view of certain orders passed by the Revenue Court. An appeal was preferred to the District Judge, but he was of opinion that the appeal lay to the Commissioner. The petition of appeal was returned and was presented in the Court of the Commissioner. The learned Commissioner has referred the case to this Court for determination of the question whether the appeal lay to the Judge or to the Commissioner. We are clearly of opinion that the appeal lay to the District Judge. S. 177, Tenancy Act, provides that an appeal shall lie to the District Judge from the decree of an Assistant Collector of the first class in all suits in which a question of proprietary title has been in issue in the Court of first instance, and is a matter in issue

in the appeal. There can be no doubt that in this case a question of proprietary title was in issue in the Court of first instance and was also a matter in issue in the appeal. The act itself indicates what is meant by a question of proprietary title. S. 198 occurs under the heading of questions of proprietary title in Revenue Courts, and deal with the a case in which the defendant pleads that the relation of landholder and tenant does not exist between the plaintiff and himself on the ground that he actually and in good faith pays the rent of his holding to some third person. In the present case the plea of the defendants was that the relation of landlord and tenant did not exist between the plaintiff and them. They alleged that they were lessees from other persons and that the plaintiff had no right to sue them. This was clearly a question of proprietary title and as it was in issue in the Court of first instance and was also a matter in issue in the appeal, the appeal lay to the District Judge under the provisions of S. 177. We express no opinion on the merits of the case but we think that the appeal ought to have been entertained by the District Judge and the memorandum of appeal ought not to have been returned. We accordingly direct that the District Judge do receive the memorandum of appeal which was originally presented to him by the appellant and dispose of the appeal according to law. The costs of this reference will abide the result.

V.B./R.K.

*Order reversed.***A. I. R. 1918 Allahabad 290 (2)**

BANERJI AND TUDBALL, JJ.

Chaturi Singh—Plaintiff—Applicant.

v.

Ramia and another — Defendants — Opposite Parties.

Civil Revision No. 182 of 1917, Decided on 3rd April 1918, from order of 2nd Addl. Sub-Judge, Aligarh.

Civil P. C. (1908), S. 24 (4)—Suit of small cause nature — Suit transferred from Sub-Judge with small cause powers to Munsif without such powers—Court as regards the suit is Court of Small Causes—Decision is not appealable—Provincial Small Causes Courts Act (9 of 1887), S. 35.

A suit to recover Rs. 273 upon a bond was filed in the Court of a Sub-Judge who was invested with Small Cause powers up to Rs. 500. Whilst the suit was pending the Sub-Judge went on leave for a short period and the Officer

who was appointed to act for him was invested with Small Cause powers only up to Rs. 250. The District Judge transferred all suits of a Small Cause nature exceeding Rs. 250 in value pending in the Sub-Judge's Court to the Court of a Munsif who had no Small Cause powers. The suit was consequently heard and decided by the Munsif:

Held: that the suit was at the time of its transfer to the Court of the Munsif pending in a Court of Small Causes and the Court to which it was transferred must under sub-S. 4, S. 24 be deemed as regards the suit to have been a Court of Small Causes and to have tried the suit as such and that its decision was therefore not appealable. [P 292 C 1]

Peary Lal Banerji—for Applicant.

Kailas Nath Katju for *Sarat Chandra Chaudhri*—for Opposite Parties.

Judgment.—This application for revision arises under the following circumstances. A suit to recover Rs. 273 upon a bond was instituted in the Court of the First additional Subordinate Judge of Aligarh who was invested with the jurisdiction of a Court of Small Causes to try suits cognizable by a Court of Small Causes not exceeding Rs. 500 in value. Whilst the suit was pending on the Small Cause Court side of the Court, Mr. Shams-ud-din Khan the presiding officer of the Court, proceeded on privilege leave for five weeks and made over charge of his office on 17th November 1916. Mr. Piarey Lal Chaturvedi was appointed to act for him as Subordinate Judge, but an order of 24th November 1916 he was invested with the jurisdiction of small causes in respect of suits the value of which did not exceed Rs. 250. On 29th November 1916 the District Judge passed an order transferring to the Court of the Munsif of Haveli Aligarh, all suits pending in the Small Cause Court side of the Additional Subordinate Judge's Court exceeding in value Rs. 250.

The present suit was accordingly transferred to the Court of the Munsif of Haveli Aligarh and was tried and decided by him on 24th February 1917. From his decree an appeal was preferred by the plaintiff but a preliminary objection was taken to the hearing of the appeal on the ground that no appeal lay as the Court of the Munsif must be deemed to have been a Court of Small Causes for the purposes of the present suit. This objection prevailed in the Court below which held that no appeal lay and on this ground dismissed it. The plaintiff has applied to this Court for revision of this order and it is contended

on his behalf that the suit must be deemed to have been tried by the Munsif as an ordinary suit cognizable in the Munsif's Court that an appeal therefore lay from the decree passed by him and that the Court below has wrongly refused to exercise jurisdiction.

The case has been ably argued on both sides, and a large number of rulings have been cited. Whilst it is contended on behalf of the plaintiff that S. 35, Provincial Small Causes Courts Act applies to the case and that the suit must be deemed to have been transferred to the Court of the Haveli Munsif from that of the Munsif of Koel in which the suit would have been instituted, had there been no Court invested with the jurisdiction of a Court of Small Causes and that consequently an appeal lay it is urged for the opposite party that at the time of its transfer the suit was pending in a Court of Small Causes within the meaning of S. 24, Civil P. C. and was tried by the Munsif as a Small Cause Court suit and that in any case S. 150, Civil P. C., applies.

Holding the view that we do we do not deem it necessary to refer to or consider the various rulings which have been cited to us. In our opinion neither S. 150, Civil P. C. nor S. 35, Small Cause Courts Act is applicable to this case. The business of the Court in which the suit was pending was not transferred to another Court nor did that Court cease to have jurisdiction with respect to that suit. As we have stated above the suit was instituted in the Court of Mr. Shams-ud-din Khan who was invested with Small Cause Court jurisdiction in suits up to the value of Rs. 500. When he proceeded on privilege leave a locum tenens was appointed with powers to try suits of value not exceeding Rs. 250. As regards suits the value of which exceeded that amount no one was appointed to take his place. Therefore the present suit the value of which was Rs. 273, remained pending in the Court of Mr. Shams-ud-din Khan. By reason of his taking leave for a short period, he did not cease to be invested with the jurisdiction of a Small Cause Court Judge and suits of value ranging from Rs. 250 to Rs. 500 must be deemed to have been pending in his Court. We do not agree with the contention that under S. 35, Small Cause Courts Act, the suit should be re-

garded as having passed to the Court of the Munsif of Koel and been transferred from that Court. The Court of the Munsif of Koel was never seized of the case and no proceeding in it was had in that Court. In our opinion the suit was at the time of its transfer to the Court of the Munsif of Haveli, Aligarh pending in a Court of Small Causes and the Court to which it was transferred must under sub S. (4), S. 24, Civil P. C., be deemed to be a Court of Small Causes as regards this suit and to have tried it as such. Its decision was therefore not appealable.

It has been held in this Court in a number of cases that a Court invested with the jurisdiction of a Court of Small Causes is a Court of Small Causes within the meaning of S. 24, and we see no reason to depart from this course of rulings. We agree with the Court below in holding that no appeal lay from the decree of the Munsif in this case and accordingly dismiss the application for revision with costs.

V.B./R.K. *Application dismissed.*

A. I. R. 1918 Allahabad 292

PIGGOTT AND WALSH, JJ.

Habeeb Ullah—Plaintiff—Appellant.

v.

Manrup and others—Defendants—Respondents.

Second Appeal No. 1576 of 1915, Decided on 20th November 1917, from the decision of Dist. Judge, Azamgarh, dated 9th September 1915.

Agra Tenancy Act (1901), Ss. 20 (2) and 25 (1)—Lease bona fide after execution but before registration of mortgage—Lease is valid under S. 20 (2) and mortgage inoperative under S. 25 (1).

The plaintiff accepted a case of certain occupancy holdings after the execution but before the registration of certain mortgages of those holdings, without notice of the mortgages and without acting fraudulently or in collusion with the occupancy tenant. On his failure to obtain possession he brought a suit for possession impleading the mortgagees as defendants to the suit:

Held: that the lease in favour of the plaintiff was a valid contract of lease for a period of five years permissible under S. 25 (1) and that the mortgage, being contrary to the express provisions of S. 20 (2) of the Act, conferred no title on the mortgagees and did not affect the plaintiff's rights. [P 293 C 2]

Malcomson and Peare Lal Banerji—for Appellant.

S. M. Y. Hasan—for Respondents.

Judgment.—The essential facts out of which these two appeals arise are as

follows: One Mahadeo, an occupancy tenant, executed on 7th July 1914 three mortgage-deeds, one in favour of Sarup and Manrup and the other two in favour of Ram Jas and Ram Phul. The deeds in question purported to give the faoresaid mortgagees possession of plots of land forming part of Mahadeo's occupancy holding. One plot was given in the first mentioned mortgage and six more plots were added in the other two. After executing these documents Mahadeo refused to get them registered and eventually the mortgagees were driven to institute a regular suit in order to obtain registration. When this suit was instituted Mahadeo declined to contest it and it was decreed against him on his own confession, so that registration was at last effected in the month of July 1915, almost one year after execution. We must take it, however, on the findings of the Courts below that possession had at once been given to the mortgagees of the plots specified in their mortgages. In the meantime, however, that is to say, on 10th August 1914 before the suit by the mortgagees had been instituted and while the question of registration was still pending before the District Registrar, Mahadeo executed another deed by which he purported to lease 20 plots of land, including the six plots specified in the mortgages in favour of Ram Jas and Ram Phul but not including plot No. 859 specified in the mortgage in favour of Sarup and Manrup, to the plaintiff Habib Ullah at an yearly rent. Habib Ullah failed to obtain possession and thereupon brought the present suit impleading as defendants the four mortgagees, the tenant Mahadeo and one Debi Din with whose position we are not now concerned.

It would seem that in the Courts below it was not noticed that the plaintiff's claim did not include plot No. 859 or that the mortgages in favour of Ram Jas and Ram Phul only affected six out of the 20 plots specified in the plaint. The case was contested as if the areas affected by the mortgages and by the lease were identical. The Court of first instance held that the mortgages being mortgages of an occupancy holding were contrary to the express provisions of the Tenancy Act and conferred no title on the mortgagees. The lease in favour of the plaintiff Habib Ullah, on the other hand, was a valid contract of lease for a period of five years,

permissible under the provisions of the Act. The learned Munsif, therefore, held that the plaintiff had a good title to possession over the land in suit as against all the defendants, subject only to the framing of the decree in such a form as to safeguard the rights of the additional defendant Debi Din. With this qualification the Court of first instance overruled all the objections taken by the mortgagees and decreed the plaintiff's claim.

There was an additional claim for damages based upon allegations of fact which the learned Munsif found not to be substantiated by the plaintiff's evidence and this part of the claim was, therefore, dismissed. There were two appeals to the District Judge, one by the plaintiff against the order dismissing his claim for damages and the other by the mortgagee defendants against the decree awarding possession to the plaintiff. The learned District Judge referring to the decision of a Bench of this Court in *Bahoran Upadhyaya v. Uttamgir* (1) has held that the plaintiff is not entitled to recover possession without refunding the mortgage-money and he has accordingly dismissed the plaintiff's claim altogether. On this view of the case the appeal filed in the Court below by the mortgagees was allowed and the cross-appeal of the plaintiff was dismissed. Hence there are two appeals now before us both brought by the plaintiff against the two decrees passed by the lower appellate Court. The learned Judge of this Court before whom the matter first came found it necessary to remit certain issues for determination by the Court below and afterwards referred the appeal to a Bench of two Judges for consideration of the question of law involved.

In our opinion the facts of this case are not covered by the ruling upon which the learned District Judge has relied. The plaintiff accepted his lease after the execution of the three mortgages in question but before their registration and it is certainly not proved by any evidence on the record that he had notice of the existence of these mortgages much less that he was acting fraudulently or in collusion with the occupancy tenant in order to defeat the rights of the mortgagees. Something has been made in argument of the fact that the plaintiff's

father witnessed the execution of one of the mortgagedeeds, but after considering the evidence given by this man Faqirey, in the trial Court we are satisfied that it is not proved that Faqirey knew that the land comprised in the mortgagedeed which he witnessed was also included in the lease afterwards taken by his son Habib Ullah. Under these circumstances it seems to us that Hibib Ullah is as much entitled to maintain the present suit for recovery of possession as lessee under the terms of the contract in his favour as he would have been to maintain a suit against a rival lessee; that is to say against a person to whom Mahadeo had also granted a lease of a portion of the same land in respect of which it could be contended that it was not binding on Habib Ullah, either because it was subsequent in date or because it was for some other reason invalid in law. The equitable principle upon which the case of *Bahoran Upadhyaya v. Uttamgir* (1) was decided does not seem to us to affect a bona fide transferee from the occupancy tenant. If the mortgagees have any remedy it is as against Mahadeo.

The appeals before us challenge the decision of the Court of first instance on the question of damages. This matter has not been adequately gone into on the facts by the lower appellate Court, but we are content to say that no sufficient cause has been shown to us for dissenting from the finding on the strength of which this part of the plaintiff's claim was dismissed by the Court of first instance. The arguments before us have proceeded on the assumption that the plaintiff has not hitherto succeeded in obtaining possession under his lease and that his allegations to the contrary in his plaint were not well founded. On this basis the claim for damages as brought must be dismissed, but otherwise we are of opinion that the decrees of the lower appellate Court must be set aside and the decree of the Court of first instance restored. The respondents will pay the costs in this and in the lower appellate Court.

V.B /R.K.

Decree set aside.

1. (1911) 88 All 779=8 A L J 931 =12 I O 112.

A. I. R. 1918 Allahabad 294

PIGGOTT AND WALSH, JJ.

Kallu—Plaintiff—Appellant.

v.

Sital—Defendant—Respondent.

Second Appeal No. 417 of 1916, Decided on 16th January 1918, from decree of Dist. Judge Cawnpore.

(a) **Agra Tenancy Act (1901), Ss. 20 and 22—Scheme of inheritance in S. 22 overrides ordinary Hindu law of inheritance—Tenancy acquired by one member—Profits thrown into common stock—Tenancy does not become in favour of all members.**

A special statute like the Agra Tenancy Act can and does modify the operation of the ordinary Hindu law in certain matters. The scheme of inheritance therefore laid down by S. 22 of the Act, being other than that prescribed by the ordinary rules of Hindu law does, within the scope of its operation, override and prevail against the ordinary Hindu law of inheritance.

[P 295 C 1]

Where a tenancy is created in favour of one member of a joint Hindu family, his throwing of the profits derived from the tenancy into the common stock of the joint family does not change the tenancy from a tenancy in favour of that member to a tenancy in favour of the entire joint family inasmuch as if that were so, it would mean a transfer of the holding from that member to a body of persons, namely the members of the joint family in contravention of the provisions of S. 20, Agra Ten. Act.

[P 295 C 1]

(a) **Agra Tenancy Act (1901), S. 20—Transfer of occupancy holding is not permissible except under S. 20.**

The interest of a non-occupancy tenant or of an occupancy tenant under the Agra Tenancy Act is not transferable except under the restrictions laid down by S. 20 of the Act. [P 295 C 1]

Peary Lal Banerjee—for Appellant.*Kailas Nath Katju*—for Respondent.

Piggott, J.—In this case the plaintiff Kallu and the defendant Sital are related in this way, that their paternal grandfathers were own brothers. Sital is the recorded tenant of a certain occupancy holding. Kallu is actually cultivating certain plots of land, making up one half of the area of the holding, and is paying for the use and occupation of these plots approximately one-half of the rent recorded as payable by Sital to the zamindar. Sital took proceedings in a Revenue Court to eject Kallu on the allegation that the latter was holding as his sub-tenant. Kallu replied that he was a joint tenant with Sital of the entire holding; that they had apportioned the fields between them merely for convenience of enjoyment and that the half-share of the rent payable by him was paid to the zamindar and not to Sital. On this, the Revenue Court directed Kallu to establish his title as co-tenant

of the holding by a suit in the civil Court. This order purports to have been passed under S. 199, Tenancy Act (No. 2 of 1901). The propriety of the order is not in question before us, and I merely mention this in order that I may not be regarded as committed to the view that this section was really applicable to the facts above set forth. Kallu's suit for a declaration of his title as joint tenant of the holding to the extent of an undivided half-share was decreed by the Court of first instance and dismissed by the District Judge in first appeal.

On a second appeal filed in this Court by Kallu certain issues of fact were remitted for trial to the lower appellate Court and findings have been received. Issue 3 as drafted would seem only to arise in the event of the findings on issues 1 and 2 being other than they were, and therefore need not be considered. On the first two issues remitted the findings are that this occupancy holding was acquired by Matola, father of Sital; that Matola was at that time a member of a joint undivided Hindu family along with the descendant or descendants of his paternal uncle Dariyao. The letting was to Matola alone and not to Matola as representing the joint family. On issue 4 a finding was returned that the tenancy enjoyed by Kallu was the result of a contract between himself and Sital, to which the zamindar was no party, and that it amounted in law to a sub-letting by Sital in favour of Kallu of the particular plots occupied by the latter. In a petition of objections presented to this Court under O. 41, R. 26, the plaintiff-appellant has challenged the findings on issue 2, but curiously enough has not challenged the finding upon issue 4. In argument before us it has been contended that the reasoning upon which the learned District Judge has arrived at his finding on issue 2 remitted to him is defective, that it proceeds upon an error of law and that it has been arrived at by mislaying the burden of proof. With regard to the abstract question of law sought to be raised on this appeal, I can only say that I could wish it had arisen in a case in which its consideration was not complicated by other circumstances.

However, the position, as I understand it, taken up by the learned District Judge, seems to me substantially correct. It was proved that the letting of the

land in question by the zamindar to Matola had taken place many years ago. There was a lease granted as long ago as the year 1864, which is one of the exhibits in the case. Matola, according to the District Judge, was at that time living as a member of a joint Hindu family along with his uncle Dariyao, or his first cousin, Ganga, or both. He took this land on lease from the zamindar and he threw the profits derived from the land into the common stock of the joint family of which he was a member. The District Judge says that no such action on the part of Matola could have the effect in law of changing the tenancy from a tenancy in favour of Matola to a tenancy in favour of the entire joint family of which Matola was a member. The interest of a non-occupancy tenant or of an occupancy tenant is not transferable except under the restrictions laid down by S. 20, Tenancy Act (No. 2 of 1901). If it were held that the conduct ascribed by the District Judge to Matola in the present case amounted to throwing his rights as occupancy tenant into the common stock of the joint family, and thereby under the Hindu law making those rights part of the joint assets of that family, it seems to me that the Court would in effect be sanctioning a transfer of the holding by Matola to a body of persons, namely the members of the joint family to which Matola at that time belonged. A special statute like the Local Tenancy Act can and does modify the operation of the ordinary Hindu law in certain matters.

The scheme of inheritance laid down by S. 22 of the Act is other than that prescribed by the ordinary rules of Hindu law and on one denies that, within the scope of its operation S. 22 aforesaid overrides and prevails against the ordinary Hindu law of inheritance. It seems to me that by a parity of reasoning it follows that when the zamindar concerned accepted Matola as his tenant, he could not be compelled by reason of any action taken by Matola to accept the entire joint family as his tenant. Our attention has been drawn in argument to one or two reported decisions of this Court. One of these clearly recognizes the fact that a Hindu joint family as such may in its corporate capacity be the tenant of a holding. This proposition I have no desire to dispute. A tenancy of this sort might easily come into existence

in favour of the sons of the tenant who originally acquired occupancy rights. And I see nothing in the Tenancy Act to conflict with the view that, if those sons lived together as members of a joint Hindu family, the family as such could be regarded as in possession of the tenancy. In the present case apart from the abstract question of law involved, we have to meet this difficulty. The findings returned by the learned District Judge are clear and explicit and the objections taken to them are objections against the train of reasoning by which the District Judge has arrived at those findings. That is what I mean by saying that the question of law involved, arises in this case in a complicated form. For the purpose of deciding this case it seems to me sufficient to say that the finding of the learned District Judge on the second of the two issues remitted to him, is not inconsistent with his finding on any of the other issues, and is not shown to be vitiated by any error of law. There remains also the finding of the District Judge on the fourth issue. I understand the finding to be in substance this.

The joint family has now admittedly been broken up and apparently this separation took place between Kallu and Sital. At that time Sital recognized that Kallu had a claim upon him in respect of the profits enjoyed by him from this holding, by reason of the fact that Matola had always thrown those profits into the common stock of the joint family. He therefore entered into an arrangement by which he gave Kallu the right to cultivate certain specific plots, making up one-half of the area of the holding, and undertook not to demand from Kallu more rent than he would himself have to pay to the zamindar on account of this one-half of the entire holding. The rent to the zamindar continued to be paid by Sital and receipts were made out in his name. In the absence of any plea in the appellant's petition before us, presented under O. 41, R. 26, against the finding on the fourth issue, I am not sure that the appellant is entitled to ask us to hold that that finding proceeds upon an error of law. Assuming that point however in his favour, it seems to me that the reasoning of the District Judge is correct. For the sake of argument, take the case of an ordinary creditor of an occupancy tenant. That creditor is pressing for payment and is

willing to take in satisfaction of his claim such profits as he may be able to make out of one-half of the occupancy holding. The tenant is forbidden by law to transfer his interests as such tenant; but he can sub-let, or he can make an assignment of the profits from year to year. Suppose that he gives his creditor the right to occupy and cultivate for his own benefit certain specific plots, forming part of his holding, and agrees only to take in the way of rent the same sum which he will himself have to pay to the landlord on account of these plots. The transaction amounts virtually to a sub-letting in favour of the creditor. The creditor thereby acquires no rights as against the zamindar, and his rights as against the occupancy tenant are limited by the terms of the contract between them. I think therefore that the finding of the District Judge on the fourth issue remitted to him is correct in law and is decisive of the appeal now before us. I would therefore dismiss the appeal with costs.

Walsh, J.—I agree.

By the Court.—The order of the Court is that the appeal is dismissed with costs.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1918 Allahabad 296 (1)

KNOX, AG. C. J.

Emperor

v.

Goda Ram—Accused.

Criminal Ref. No. 557 of 1917, Decided on 11th July 1917, reference made by Sess. Judge, Gorakhpur.

Criminal P. C. (5 of 1898), S. 215—Commitment to Sessions can be quashed only on ground of illegality.

An order of commitment to a Court of Session can be quashed by the High Court only on a point of law. A commitment may be inconvenient or may be indiscreet, but the High Court is concerned only with the question of its legality: 10 I. C. 802, *Rel. on.* [P 296 C 2]

Judgment.—Goda Ram has been committed to the Court of Session for trial on a charge under Ss. 309, 307 or S. 324, I. P. C. The learned Sessions Judge says in his order of reference that there is no evidence to support the charge of attempting to murder and he therefore recommends that the order of commitment be set aside. There is evidence on the record which supports the charge under S. 324 and that offence is triable by a Court of Session. Commitments can be quashed only on a point of law; vide S. 215, Cri-

minal P. C. The commitment, as pointed out by Heaton, J. in the case *Emperor v. Suleman Ibrahim Nakhuda* (1), may be convenient or may be indiscreet, but the High Court is concerned only with the question of legality. The order of commitment will therefore stand. With this answer the record will be sent back to the lower Court.

V.B./R.K.

Case sent back.

1. (1911) 10 I C 802=12 Cr L J 256.

A. I. R. 1918 Allahabad 296 (2)

FIGGOTT AND WALSH, JJ.

Girdhar Das and others—Defendants—Appellants.

v.

Sidheshwari Parsad Narain Singh and others—Plaintiffs—Respondents.

First Appeal No. 86 of 1916, Decided on 26th February 1918, from a decree of Sub-Judge, Benares.

Civil P. C. (1908), O. 21, Rr. 91, 92 and 93—Property sold twice over—Suit by second purchaser to recover purchase-money is maintainable.

Where the property of a judgment-debtor has once been sold by Court-auction, he has no interest in the property subsequent to the sale and a purchaser at a second sale of the same property therefore acquires no interest by his purchase and is entitled to maintain a suit for the refund of the purchase-money paid by him against all the creditors of the judgment-debtor to whom payments have been made out of that money.

[P 297 C 1]

Jawahirlal Nehru and Harnandan Prasad—for Appellants.

Brij Nath Vyas and Kanhya Lal—for Respondents.

Judgment.—The essential point raised by this first appeal is quite a simple one. Certain house property situated within the city of Benares belonged to one Rajendradhari Singh, who seems to have been heavily in debt. There were two auction sales of the house property in question: One on 15th February 1906, resulting in a purchase by Ram Prasad Singh, and another on 18th March 1907, resulting in a purchase by the present plaintiffs-respondents. The latter paid their purchase-money into Court and that money passed under the orders of the Court into the hands of a large number of creditors of Rajendradhari Singh, who had applied for rateable distribution in respect of any money which might be realized by the auction-sale. Subsequently Ram Prasad Singh brought a suit, in which he impleaded the judgment-creditor on whose application the attachment resulting in

the sale of 18th March 1907, had been made and also the present plaintiffs, the auction-purchasers at the said sale. The result of that suit was a decision, between these parties, that the same property had been sold twice over first to Ram Prasad Singh in February 1906, and then to the plaintiffs in March 1907. It followed as a necessary consequence that on the date of the latter sale, the judgment-debtor Rajendradhari Singh had no saleable interest in the property purchased by the plaintiffs. The latter had therefore obtained nothing by their purchase and became entitled to maintain a suit against all the judgment-creditors of Rajendradhari Singh to whom payments were made out of the money which the plaintiffs had paid into Court. The law on this point is clearly settled, as may be seen by referring to the cases of *Kishun Lal v. Muhammad Safdar Ali Khan* (1) and *Muhammad Najib Ullah v. Jai Narain* (2). The Court below has accordingly decreed the plaintiff's claim against a large number of defendants, in accordance with the sums found to be respectively due from each defendant, or group of defendants. The appeal now before us is by five of the defendants only. The question as to the maintainability of the suit must be decided against the appellants in accordance with the rulings above referred to. The question whether the present suit was or was not within limitation, has already been up to this Court in appeal and has been decided in the plaintiff's favour. The report may be found in *Sidheswari Prasad Narain Singh v. Mayanand Gir* (3).

There are pleas taken in the memorandum of appeal before us which are apparently intended to suggest that the decision in the suit brought by Ram Prasad Singh has in some way been used against the present defendants improperly in this litigation. The plaintiffs were obviously entitled to prove that they had lost the benefit of their auction-purchase by reason of the fact that Ram Prasad Singh had succeeded in proving that he had himself purchased identically the same property at the auction-sale of February 1906. This fact could most readily be proved by the record of the suit in which Ram Prasad Singh was the plaintiff and the present

plaintiffs, along with the attaching creditor of Rajendradhari Singh, were the defendants. Beyond this, I do not think that the Court below has made any use of the record of this previous litigation. The contesting defendants, other than original attaching creditor, were allowed to raise every question of fact which could have been raised by them if they had been defendants in the suit brought by Ram Prasad Singh. They could not as a matter of fact have been made defendants in that suit, because it had been instituted before the order for rateable distribution of the sale-proceeds of the sale of March 1907, had been passed. This however I only mention incidentally. The questions of fact requiring determination at this trial were the identity or otherwise of the property purchased at the two sales of February 1906 and March 1907; and secondly, the validity or otherwise of the plea taken by these defendants that Ram Prasad Singh was merely a benami purchaser for the benefit of the judgment-debtor, Rajendradhari Singh. The identity of the properties sold at the two auction-sales has been established by abundant evidence and the point scarcely admits of argument. The truth of the matter is that Rajendradhari Singh had purchased a number of contiguous houses in the city of Benares and had then built himself a residence, with suitable out-houses and other appurtenances, situated within one single enclosure covering the sites of the various houses purchased by him. At both the auction-sales everything within the enclosure, the boundaries of which were clearly specified in the sale-proclamation, was put up for sale and was purchased by Ram Prasad Singh in February 1906 and by the present plaintiffs in March 1907. There is no force in the contention that different house numbers were mentioned in the sale proclamations of the two years. The identity of the property sold is sufficiently established by the sale proclamations and by the evidence of the Court official who conducted the sales. Ram Prasad Singh was at any rate the ostensible purchaser at the sale of February 1906.

The evidence by which the defendants in this suit have sought to show that he was a benamidar for Rajendradhari Singh, is of very little substance. Certain evidence has been produced tending to show that Rajendradhari Singh

1. (1891) 18 All 383.

2. A I R 1914 All 252=86 All 529=26 I O 59.

3. (1918) 85 All 419=19 I O 986.

was in funds in the month of February 1906, so that he could have made this purchase if he wanted to do so. The case for the defendants can scarcely be said to go beyond this. It is true that Ram Prasad Singh does not appear to have taken as yet effective possession of the whole of the property sold to him; but the evidence on the record supplies abundant explanation of this fact. When the time for delivery of possession came, Rajendradhari Singh was lying seriously ill inside the house, and it would seem that he died there shortly afterwards. The evidence for the defendants does not carry us beyond the fact that Ram Prasad Singh has not hitherto taken steps to evict Rajendradhari Singh's widow from the premises. This may be due to sympathetic consideration on his part, or it may be that he does not desire to contest the possible question of the widow's right of residence. Moreover, it must be remembered that Ram Prasad Singh's position has been complicated by the subsequent auction-sale of 1907, and by the litigation in which he has been involved in order to enforce his title. The decision of the High Court in his favour was not pronounced until the month of November 1909. On the whole, there seems no valid basis for a finding that the purchase effected by Ram Prasad Singh at the auction-sale of February 1906 was benami on behalf of the judgment-debtor, or was anything but a bona fide purchase for his own benefit. The defendants have further raised another very curious plea, suggesting that the auction-purchase by the plaintiffs themselves in the month of March 1907 was also benami on behalf and for the benefit of Rajendradhari Singh or his heirs. In fact this seems to have been treated as the main issue in the case. We have been taken through the evidence on the point, and it is really unnecessary for us to say more than that we find no reason for dissenting from the opinion formed by the trial Court regarding that evidence.

We can find no real reason for doubting, that the purchase money paid in connection with the auction-sale of March 1907, was found by the plaintiffs themselves and that the purchase was effected on behalf of the plaintiffs, for their benefit, by their agent, Sheodhar Prasad. The only remaining plea in the memo-

randum of appeal before us is that Ram Prasad Singh's decree invalidating the sale of March 1907, and affirming the validity of his own purchase at the sale of February 1906, was obtained by some sort of fraudulent collusion between himself and the then defendants. There is no basis for that contention, beyond the fact that the present plaintiffs did not choose to appeal against Ram Prasad Singh's decree; but the matter was fully fought out by the principal defendant, the attaching judgment-creditor, and the essential issues of fact were found in favour of Ram Prasad Singh after contest, as they have again been found in his favour after contest in the present litigation. There is, therefore, no force in this appeal. We dismiss it with costs.

V.B./R.K.

Appeal dismissed.

A. I. R. 1918 Allahabad 298

BANERJI AND WALSH, JJ.

Premgir—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 733 of 1917, Decided on 5th October 1917, from order of Sess. Judge, Mirzapore, D/- 31st August 1917.

Criminal P. C. (5 of 1898), Ss. 289 and 537 Failure to call accused to enter defence is irregularity curable under S. 537 if no prejudice is caused.

The omission to call upon an accused to enter on his defence is an irregularity covered by S. 537 provided the accused has not in any way been prejudiced by it. [P 299 C 2]

Satya Narain—for Appellant.

W.K. Porter—for the Crown.

Judgment.—Premgir, a boy whose age between 14 and 15 years, has been convicted of having murdered another boy named Parshotam, aged about 12 years. He has been sentenced to death and the record has been submitted for confirmation of the capital sentence. He has appealed from jail. The case for the prosecution is that the accused and the deceased were gambling with couries in a jungle. There was some quarrel between them. The deceased struck the accused a lathi blow and thereupon the latter who had a small axe in his hand struck him with it and killed him, and subsequently cut off his hands and appropriated the silver bangles which the deceased was wearing as also his gold earrings. The evidence proves that the deceased boy was missing. His relatives searched for

him but without success. A woman of the name of Budhni told Sat Narayan, the uncle of the deceased, that if he went to the jungle he might find something. He did go there and discovered the dead body of the boy. The matter was mentioned to Hira Lal, the headman of the village, who sent for the accused. Hira Lal swears that the accused admitted having killed the boy Parshotam. Hira Lal says that the accused told him that the winnings of the deceased went up to twelve annas and the deceased pressed him for payment. The accused promised to pay by instalments, but the deceased apparently did not agree and hit him with his stick on the shoulder. He (the accused) had an axe in his hand and with it he cut him down and covered him with leaves under a sal tree. According to Hira Lal the accused brought the axe from his house and handed it over to Hira Lal. Its handle had been changed. This according to Hira Lal was before the arrival of the Sub-Inspector. The accused in his statement before the Committing Magistrate admitted that he had made the confession deposed to by Hira Lal, but he said that he had done so at the desire of the darogha. As we have already said, according to the evidence of Hira Lal, the darogha had not arrived when the confession was made. Hira Lal also proves that when the Sub-Inspector came at night the accused took him to the spot where the murder had been committed and then to a tree where the body was lying. The hands of the deceased boy had been cut off and his throat was cut, there being marks of 5 or 6 blows on the head. The bamboo handle of the axe and also the stick which was said to have been Parshotam's stick were found near the spot. Subsequently the accused produced the bangles and ear-rings in the presence of a number of witnesses from the thatch of his house and handed them over to the police. There can be no doubt that the accused murdered the boy Parshotam.

The learned vakil for the appellant has asked us to set aside the conviction, because he contends that the provisions of S. 269 Criminal P. C., have not been complied with. He urges that under Cl. 4 of that section the Court should have called upon the accused to enter on his defence and this was not done in the present case. In the first place, we may observe that there is nothing to show that

the Court did not call upon the accused to enter on his defence. On being asked he had told the learned Judge that he would not call any witness. He was being defended by a pleader and there is no affidavit before us or anything else to show that the Court had not called upon the accused or his pleader to enter on his defence. In the next place, if there was any omission it would in our opinion, be covered by the provisions of S. 537 Criminal P. C., as it is manifest that the accused was not in any way prejudiced by it. We agree with the learned Sessions Judge that the accused is guilty of murder but in consideration of his youth and the fact that he is a mere boy we think the extreme penalty of the law is not called for in this case. We accordingly alter the sentence to one of transportation for life. We allow the appeal so far that we set aside the sentence of death and in lieu thereof sentence the accused Premgir to transportation for life with effect from 13th of August 1917

V.B./R.K. *Appeal partly allowed.*

* A. I. R. 1918 Allahabad 299

PIGGOTT AND WALSH, JJ.

Lala and another—Applicants.

v.

Emperor—Opposite Party.

Criminal Revn. No. 837 of 1917 and Criminal Ref. No. 752 of 1917, Decided on 8th November 1917, against order of Sess. Judge, Cawnpore, D/- 6th September 1917.

(a) Penal Code (1860), Ss. 441 and 509—Stranger lurking in house of another at night—Prosecution can ask Court to infer that there was guilty intention sufficient to bring action within S. 441.

Where the evidence shows that a man has been found lurking at night inside the house of another person, a perfect stranger to him, or a person in whose house he has no apparent business, the prosecution is entitled to ask the Court to infer from these facts that there was a guilty intention on the part of the accused sufficient to bring his action within the purview of S. 441.

[P 30 C 1]

In dealing with cases of this sort Magistrates should not overlook the existence of S. 509, when they are considering the allegation on the part of the prosecution that the entry by the accused into the premises in question must presumably have been with intent to commit some offence.

[P 30 C 1]

* (b) Penal Code (1860), S. 441—House trespass—Accused alleging that he went to carry on intrigue with woman in house—Complicity by woman—Intention to preserve secrecy—It is difficult to say that there was any intention to annoy third person unless

that person had expressly prohibited accused.

Per Walsh, J.—Where in a case of house-trespass the accused alleges that he went to the house to carry on an intrigue with a woman who was the inmate of the house, then if there was an invitation or complicity by the woman, combined with an intention to preserve strict secrecy, it is difficult to say that there was any intention to annoy a third person but if that third person had expressly prohibited the accused, then his act becomes a direct defiance to an express order, and it is impossible to say that an intention to annoy the author of the order cannot be inferred from it. [P 302 C 1]

S. Mushran and K. N. Katju—for Applicant.

R. Malcomson—for the Crown.

Cr. Rev. No. 837 of 1917

Judgment.—This is a case in which a conviction of lurking house-trespass by night (S. 456, I. P. C.) has been recorded by the trying Magistrate and has been confirmed by the Sessions Judge on appeal. The case has come before us in revision, substantially upon the pleading that on the view of the facts taken by the learned Sessions Judge the latter ought to have held that no offence had been proved. One difficulty we must necessarily feel in dealing with the case on these lines is that the learned Sessions Judge has not definitely found the facts to lie in accordance with the argument addressed to us in support of this application. The facts in question were not alleged by the accused himself, but certain circumstances suggesting the possibility of their existence were deposed to by some of the witnesses called for the defence. The learned Sessions Judge has in effect said that even supposing the facts to be as now suggested on behalf of the accused, the conviction must be upheld. In substance the case before us is really governed by the decision of this Court in the case of *Mulla v. Emperor* (1) and might well have been affirmed on those grounds. Apart from this, we have just been considering in connexion with Criminal Reference No. 752 of 1917 the question of law which has been discussed in connexion with the present application and we need only say that we think the conviction in the present case could be justified along the line of argument followed by the learned Sessions Judge. In saying this we are by no means admitting the facts to be as suggested on behalf of the accused. It would be un-

fair to do so in the face of the express denial of those facts by Mt. Bhagia (the young woman principally concerned) in the evidence given by her before the Court. We dismiss the application and confirm the conviction and sentence passed by the Magistrate. The accused must surrender to his bail to undergo the unexpired portion of his sentence.

Cr. Ref. No. 752 of 1917

Piggott, J.—This is a reference by the District Magistrate of Banda in a case in which one Chhote Lal was tried summarily by a First Class Magistrate of that district. The offence alleged was that of lurking house-trespass by night, and it is clear from the record that the prosecution led evidence to prove, not merely that the house of the complainant was entered by Chhote Lal under circumstances covered by the definition in S. 443, I. P. C., but also that the lurking house-trespass in question was committed with intent to commit theft. The accused in his defence admitted having been caught at night inside the house of the complainant Badri under the circumstances deposed to by the prosecution witness. He suggested that those witnesses were not speaking the truth with regard to his having stolen or attempted to steal any of Badri's property. He pleaded that his intention in effecting a secret entry into Badri's house had been to carry on an intrigue with the widowed mother of the said Badri. He pleaded further that he had entered the house at the express invitation of this woman.

The trying Magistrate refused to inquire fully into the facts. He has left it uncertain whether there was any truth in the defence above set out. He says that even on the accused's own statement of the facts, an offence, namely, the offence of lurking house-trespass by night, punishable under S. 456, I. P. C., was established. He convicted and sentenced Chhote Lal accordingly. The District Magistrate, in referring the case, has relied upon the reported decision of a Judge of this Court in the case of *Gaya Bhar v. Emperor* (2). It has been suggested that this decision is inconsistent with that of another Judge of this Court in the case of *Mulla v. Emperor* (1). In our opinion the two decisions are not in-

1. A I R 1915 All 178=37 All 895=29 I C 67 =16 Cr L J 435.

2. (1916) 38 All 517=35 I C 979=17 Cr L J 419.

consistent and we agree substantially with both of them. When the evidence shows that a man has been found lurking at night inside the house of another person, a perfect stranger to him, or a person in whose house he has no apparent business, the prosecution will be entitled to ask the Court to infer from these facts that there was a guilty intention on the part of the accused sufficient to bring his action within the purview of S. 441, I. P. C. This was clearly laid down in the case of *Balmakand Ram v. Ghan-samram* (3) and also in the case of *Prem-anundo Shaha v. Brindabun Chung* (4). And in dealing with cases of this sort we may remark that Magistrates should not overlook the existence of S. 509, I. P. C., when they are considering the allegation on the part of the prosecution that the entry by the accused into the premises in question must presumably have been with intent to commit some offence. Difficulties are only likely to arise when the accused himself pleads in his defence and establishes, either by direct evidence or by way of reasonable inference from proved facts, that he had some specific intention in entering the house and that the intention in question was neither to commit an offence nor to intimidate, insult or annoy any person in possession of the house.

The provisions of S. 106, Evidence Act (1 of 1872), may also be referred to in this connexion. In the case now before us the accused alleged two things, firstly, that he had entered the house at the request of one of its inmates and, secondly, that he had no intention of insulting or annoying the complainant Badri. Presumably it might be suggested in his defence that the latter plea was sufficiently established by the precautions taken by him to conceal from Badri the fact of his presence in the house. At any rate it was clearly no part of the case for the prosecution that Badri knew of the existence of any intrigue between the accused Ohhote Lal and his mother, or had ever forbidden Ohhote Lal access to his house on the ground of his knowing or suspecting the existence of such intrigue. We make these remarks because we think it possible that the decision of the learned Judge of this Court in the case of *Gaya Bhar v. Emperor* (2) may possibly

be interpreted too widely and may be held to apply to cases in which an accused person has forcibly or clandestinely entered a house which he knew to have been definitely closed and barred against him by the owner thereof. In such cases it might not be a sufficient answer to a charge of criminal trespass for the accused to say that he personally hoped that the owner would remain in ignorance of the fact of his entry. The Court may find on the facts that the intention to insult or annoy under such circumstances was so clearly inherent in the acts of the accused as to form an essential part of the purpose with which entry into the house was effected.

On this point the remarks of the learned Judges of the Bombay High Court in the case of *Emperor v. Lakshman Raghunath* (5) are certainly pertinent. In our opinion there should have been a further enquiry into this case before the accused was either convicted or acquitted. He was anxious himself to summon the complainant's mother as his witness, and the trying Magistrate has given no valid reasons for refusing that request. It may be that this woman's evidence would have entirely satisfied the Magistrate as to the facts of the case, and the Magistrate may come to the conclusions that the allegations made by the accused in his defence are wholly false and that he has aggravated his position by putting forward these allegation and dragging a respectable woman into Court on the strength of them. On the other hand, if the Magistrate finds the facts to be alleged by the accused, the case should be decided on the principles of law laid down in the rulings to which we have referred, including the decision of this Court in the case of *Gaya Bhar v. Emperor* (2) from which, if the principles laid down are properly limited and understood, we see no reason to dissent, we set aside the conviction and sentence in this case, but we do not acquit the accused Ohhote Lal of the offence charged. On the contrary we direct the Magistrate to proceed with the trial, to enquire into the truth or otherwise of the defence set up and to pass such orders in the case as appear to him correct and appropriate.

Walsh, J.—I agree. What I propose to say on the question of law referred to us covers this case and also Criminal Re-

3. (1895) 22 Cal 891.

4. (1895) 22 Cal 994.

5. (1902) 26 Bom 558.

vision No. 837 of 1917 before us for orders. I think it is a question of fact in each case. As Bower, L. J. says in *Edgington v. Fitzmaurice* (6),

"the state of a man's intention is as much a question of fact as the state of his digestion,"

and the real question of law is whether when there has been a conviction, there is any evidence of intention justifying the conviction. I think there is no conflict between the reported cases at all and I venture to sum up the result of them in this way. I think they come to this that if there is an invitation, or complicity by the woman, combined with an intention to preserve strict secrecy, then it is difficult to say that there is any intention to annoy a third person, but if that third person has expressly prohibited the accused then his act becomes a direct defiance to an express order, and it is impossible to say that you cannot infer from it an intention to annoy the author of the order. I think this is what has already been established by the decided cases. I agree with the decision of Knox, J. in *Mulla v. Emperor* (1) that a man found inside the complainant's house who makes no statement of reasons for being there or gives an explanation which is demonstrably false, is clearly liable to be convicted on the ground that the burden of proof lies upon him and he has not discharged it. I do not understand that Sunder Lal, J. differed from that decision. On the contrary he seems to have agreed with it. Sunder Lal, J. held in *Gaya Bhar v. Emperor* (2) that mere knowledge on the part of the accused that he is likely to cause annoyance is not sufficient, and in coming to that conclusion he merely followed the case of *Queen - Empress v. Rayapadayachi* (7), where it was held that although a man may know his act is likely to cause annoyance, it does not necessarily follow that he does the act with intent to annoy. And so far I think Sunder Lal, J., and the Madras High Court were really giving effect to the absence from this section (S. 441) of the words found in a cognate section, namely, S. 297 were the knowledge that the feelings of a person are likely to be wounded is one of the ingredients of the offence. This view is borne out by the decision in *Emperor v. Lakshman Raghunath* (5), to which

my brother Piggott has already referred. In that case there was a distinct prohibition.

The accused only wanted to get at their judgment-debtor and trespassed upon the complainant's house in order to do it. Some people might be annoyed by that while some people might not mind it, and an enemy of the judgment-debtor certainly would not. But in the particular case the complainant forbade them to do it and it was held—and I agree with the decision—that in the face of his order directly forbidding them, an offence was committed within this section. There is a passage in that judgment which I adopt:

"When it is uncertain whether a particular result will follow (as in the Madras case in which the accused hoped to keep his conduct secret) there may be no intent to cause that result even though it may be known that the result is likely. But it seems impossible to contend when an act is done with a knowledge amounting to practical certainty that a result will follow that it is not intended to cause that result."

Regard must obviously be had to all the circumstances of the case. It may sometimes happen, I suppose in this country as in others, that a man who is making love with another man's wife is doing it not merely with the tacit approval of the husband, but as the result of a conspiracy, if I may use the word, between the husband and the wife to enable the wife to get away from the husband and find a protector. Such cases are not unknown. In such a case the man might not know that his visits were approved by the husband and might think that he was successfully carrying on a secret intrigue, the truth being that the husband was assisting the wife all the time. I take it that no Court ought to find, if those facts were established and although the man complained against himself might have thought that his conduct was likely to annoy, that he had any intention of annoying the husband. I agree with the view taken by the learned Sessions Judge of Cawnpore in the case which is before us, Revision No. 837 of 1917, that if the accused knew that he had been expressly prohibited from entering the house by the uncle it is legitimate to infer that he intended to annoy by persisting. Another example is that of a son in disgrace who persists in entering his father's house after a direct prohibition. I think this feature of the case in Reference No.

6. (1885) 29 Ch D 459.

7. (1896) 19 Mad 240.

837 of 1917 just marks the dividing line between the two cases. I entirely agree with the order proposed in the case before us. The facts must be ascertained before the final decision can be arrived at.

V.B./R.K.

Order accordingly.

*** A. I. R. 1918 Allahabad 303 (1)**

KNOX, J.

Makhan and others—Applicants.

v.

Emperor—Opposite Party.

Criminal Ref. No. 1015 of 1917, Decided on 17th December 1917, made by Sess. Judge, Mainpuri, D/- 5th November 1917.

*Criminal P. C. (1898), S. 397—Order that sentences passed on accused in two trials held on same day should run concurrently is not illegal.

An order that sentences of imprisonment passed upon an accused in two trials held on one and the same day should run concurrently is not illegal inasmuch as until an accused has actually passed into the jail he is not undergoing a sentence of imprisonment within the meaning of S. 397. [P 303 C 1,2]

Judgment.—This is a reference made by the Sessions Judge of Mainpuri. He has submitted the case with a request that the convictions and sentences of all the applicants may be quashed. The applicants are Makhan, Sultan, Nathu and Chiranji, and the order which I am asked to revise is dated 19th October 1917 whereby these persons save Chiranji were sentenced to one month's rigorous imprisonment and Chiranji was sentenced to pay a fine of Rs. 25 and in default of fine to undergo one month's rigorous imprisonment. The reason given are that the concurrent sentences passed on Makhan and Sultan are illegal. On reference to the record it appears that Makhan and Sultan were convicted under Ss. 325 and 323 for assaulting two other persons on the same occasion. It further appears that at another trial, in which sentence was passed on the same day as in the case under reference, they were tried and sentenced for another offence. The Magistrate in the case under reference directed that the sentences of imprisonment should run concurrently with those passed in the other case. The learned Judge considers that this order was illegal. I fail to see that it was illegal. Apparently the learned Judge had in his mind S. 397, Criminal P. C., but that refers only to the case of persons who are already

undergoing a sentence of imprisonment. It is true that the sentence of imprisonment had been pronounced in the second case; but until an accused has actually passed into the jail I am not prepared to hold that he was undergoing a sentence of imprisonment. I find that the Bombay High Court in the case of *Emperor v. Mahomed Isaf Habib* (1) held that such an order was not illegal. The learned Judges there say that the trials took place on one and the same day and one after the other, so it was for all practical purposes one trial.

The next reason which the learned Judge assigns is that the case should not have been tried separately from the case in which Ajudhia and Hukum Singh were the principal accused. There was only one assault according to the learned Judge. The complainant's case was that he was waylaid by certain persons who beat him and were carrying him off, when other persons arrived on the scene to help him. These were then assaulted in turn by two of the original assailants of the complainant and two other friends of theirs. Legally two, if not more, offences were committed and the two assaults were two separate transactions. The third reason given is that the learned Sessions Judge has held that the other case was not brought home to Sultan. It by no means follows that this case was a false one. The fourth reason is that the case should be doubted as being an afterthought, mainly because these persons were not mentioned in the first report. I am not satisfied that there has been any case in which I ought to interfere. I set aside the reference and direct that the record be returned.

V.B./R.K.

Reference rejected.

1. (1911) 10 I C 769=12 Cr L J 241.

A. I. R. 1918 Allahabad 303 (2)

BANERJI AND PIGGOTT, JJ.

Bhagwandas Gondka—Plaintiff—Appellant.

v.

Ram Kumar Ramesher Das—Defendant—Respondent.

First Appeal No. 29 of 1918, Decided on 27th June 1918 from an order of Sub-Judge, Cawnpur, D/- 4th February 1918.

Civil P. C. (1908), O. 11, Rr. 6, 7, and 21—Interrogatories objected as irrelevant—Court

must decide the question before requiring party to answer or refuse.

Where a plaintiff to whom interrogatories have been put by the defendant objects that they are not relevant to the issues, it is the duty of the Court to adjudicate upon the question and to the plaintiff an option of complying or refusing to comply with a clear and specific order directing him to answer such of the interrogatories as the Court holds to be relevant. [P 304 C 2 P 305 C 1]

B. E. O'Connor and *S. M. Suleman* — for Appellant.

Moti Lal Nehru, Tej Bahadur Sapru and *Janaki Prasad* — for Respondent.

Judgment.—This is an appeal against an order passed under O. 21, R. 11, Civil P. C., dismissing a suit for want of prosecution, on the ground that the plaintiff had failed to comply with an order to answer interrogatories. The suit was between two trading firms and the claim was one for damages for breach of contract. The plaint was filed on 15th August 1917 and issues were fixed on 10th September 1917. On 2nd November 1917 the defendant put in a list of interrogatories, ten in number, and asked that the plaintiff be ordered to answer the same. This order was served on the plaintiff on 12th November 1917. Seven days later, that is to say on 19th November 1917, the plaintiff came into Court with a statement and affidavit in the course of which he answered the first two, and claimed to have also answered the third of the interrogatories. In respect of the remaining seven he objected that they were irrelevant to the issues for trial. This was an objection taken under R. 6, O. 11 and it required adjudication by the Court. The learned Subordinate Judge seems to have thought that the only remedy open to the plaintiff, if he objected to answering any of the interrogatories, was to ask to have the interrogatories to which he objected set aside or struck out under O. 11, R. 7. It seems to us that R. 6 above referred to gave the plaintiff an alternative relief of which in fact he availed himself. On 22nd November 1917, in the absence of the plaintiff, the defendant put in an application purporting to be under O. 21, R. 11, asking that the plaintiff be required to answer further, that is to say, to return answers to the remaining seven interrogatories. On this an ex parte order was passed in the following terms:

"The plaintiff be asked to answer the interrogatories. If he fails to comply he will do so at his own risk."

On 26th November 1917 the plaintiff presented to the Court a formal petition asking it to reconsider the ex parte order of November 22nd. He reiterated that the interrogatories which he had failed to answer were irrelevant and expressly appealed to the Court to deal with this objection and to pass specific orders in respect of each of the questions objected to. It was in the order passed on this application that it seems to us that the learned Subordinate Judge went distinctly wrong. He began by saying that the order of 22nd November was not prejudicial to the plaintiff, a vague expression which necessarily left the parties in doubt as to the intentions of the Court. He concluded by saying that he declined to reconsider the said order. He did this admittedly without pronouncing any opinion on the question of the relevancy of any one of the interrogatories to which the plaintiff had objected. On 1st December 1917 the defendant put in an application under R. 21 asking the Court to dismiss the suit, which was then set down for hearing on 4th February 1918. Even this application the Court did not deal with at once, but directed that it should be put up on the date of the hearing. In the interval the parties caused commissions to be issued and witnesses to be summoned. The Court then took up the defendant's petition of 1st December 1917, took into consideration the question of the relevancy of the interrogatories to which the plaintiff had objected, held that those interrogatories were relevant, and then without offering the plaintiff any further opportunity of answering the same, proceeded to dismiss the suit under the rule in question. The learned Subordinate Judge remarks that he was compelled to adopt this course apparently by reason of his desire to correct abuses of procedure which he had observed in the conduct of other litigations in his Court.

He was certainly not compelled by the provisions of O. 21, R. 11, to dismiss the suit and as a matter of ordinary fairness to the parties, he should have taken into consideration the fact that the plaintiff had been waiting from 19th November 1917 to that date for a clear adjudication upon his objection to the relevancy of seven of the interrogatories. We think that the Court below was not justified by anything in the provisions of O. 11,

Civil P. C., in postponing its adjudication upon this question to the date of hearing and then refusing the plaintiff the option of complying, or refusing to comply, with a clear and specific order directing him to answer such interrogatories as the Court might hold to be relevant. The order which the Court had passed on 26th November 1917 was calculated to mislead the plaintiff. It does not seem to us that he had adequate warning of the course which the Court below intended to take. For these reasons we set aside the order complained of and remand the suit to the Court below for trial on the merits. Costs here and hitherto will be costs in the cause.

V.B./R.K.

Appeal allowed.

A. I. R. 1918 Allahabad 305

BANERJI AND RYVES, JJ.

Lala Ram—Plaintiff—Appellant.

v.

Thakur Prasad—Defendant—Respondent.

Second Appeal No. 1340 of 1916, Decided on 1st July 1918, from a decree of Sub-Judge, Mainpuri, D/- 13th April 1916.

Civil P. C. (5 of 1908), S. 60 (c) and O. 21, R. 92—Objection under S. 60 (c) cannot be raised in defence in suit for possession by auction purchaser obtaining formal possession, if no objection was raised in execution.

Plaintiff, who was the purchaser of a house in execution of a decree and had obtained formal delivery of possession, brought a suit for actual possession of the house. The claim was contested on the ground that the house claimed was the house of an agriculturist and was therefore not liable to sale in execution of a decree in view of the provisions of S. 60 (c), Civil P. C.:

Held: that the defendant having failed to take the objection in execution of the decree and the sale having become conclusive as between him and the plaintiff, it was not open to him to contend that the sale ought never to have taken place and conveyed no title to the purchaser.

[P 806 C 1]

Baleshwari Prasad—for Appellant.*Girdhari Lal Agarwala*—for Respondent.

Judgment.—This appeal arises out of a suit brought by the plaintiff-appellant for possession of a house which originally belonged to the defendant-respondent. In execution of a decree obtained against the said defendant the house was sold by auction so far back as 23rd November 1910 and it was purchased by the plaintiff. He obtained formal delivery of

1918 A/39 & 40

possession, but as he did not get actual possession he brought the present suit. The claim was contested on the ground that the house claimed was the house of an agriculturist and was therefore not liable to sale in execution of a decree in view of the provisions of S. 60 (c), Civil P. C. This objection prevailed in the Courts below and the suit was dismissed. The plaintiff has preferred this appeal and he raises two questions.

The first is that the lower appellate Court ought to have determined whether the house was the house of an agriculturist or was appurtenant to the house of an agriculturist within the meaning of Cl. (c), S. 60; and secondly, even if the house was of the description mentioned in that clause, whether after the sale and confirmation of sale it was open to the defendant at this stage to question the validity of the sale and the title which the plaintiff had acquired under it. As regards the first point the lower appellate Court says that it was a fact not disputed that the defendant was a tenant and that the house in dispute was an appurtenance to his tenancy. We must accept this statement of fact as correct and assume that the house in dispute is an appurtenance to the tenancy of an agriculturist as such. If an objection had been taken before the auction-sale it ought not to have been sold, but the question which arises is, whether after the sale and the confirmation of the sale its validity can now be questioned by the defendant as against whom the sale has become conclusive by reason of its confirmation. Under O. 21, R. 92, after a sale has taken place and has been confirmed, the auction-purchaser acquires a title to the property. In the present instance no objection to the sale was raised before it took place or at any time. It is not suggested in the pleadings that the defendant-judgment debtor was not aware of the execution proceedings; so that as between him and the auction-purchaser the sale has become conclusive and the auction-purchaser has acquired a vested interest in the property sold. If objection had been raised on behalf of the defendant before the auction-sale, the Court would have had jurisdiction to consider and decide whether the property was of the description mentioned in S. 60 (c), and if it had decided that the property was liable to sale and no appeal

had been preferred against such decision, the sale of the property could never be questioned.

In the present case no objection having been taken and the sale having become conclusive as between the parties, it is not open, in our opinion, to the defendant, after the lapse of so many years from the date of the sale, to contend that the sale ought never to have taken place and conveyed no title to the purchaser. This view is supported by the decision of this Court in *Umed v. Jas Ram* (1) and also by the decision referred to in the judgment in that case. The rulings of the Bombay High Court in *Pandurang v. Krishnaji* (2) and of the Calcutta High Court in *Dwarkanath Pal v. Tarini Sankar Roy* (3) are to the same effect. The only case in which a contrary view appears to have been held is the unreported judgment of a Single Judge of this Court in Second Appeal No. 327 of 1910, decided on 16th January 1911. In that case the learned Judge held that an objection as to attachment and sale could not be made before the auction sale. We are unable to agree with this view and we do not feel ourselves justified in following that ruling in the face of the other rulings to which we have already referred. The result is that we allow the appeal, set aside the decrees of the Courts below and decree the plaintiff's suit with costs in all Courts.

V.B./R.K.

Appeal allowed.

1. (1907) 29 All 612.
2. (1904) 28 Bom 125.
3. (1907) 34 Cal 199.

A. I. R. 1918 Allahabad 306

RICHARDS, C. J. AND BANERJI, J.

Mrs. E. E. W. Meik, In the goods of Testamentary Case No. 7 of 1916, Decided on 4th December 1916.

Court-fees Act (7 of 1870), Ss. 19 (8), 19 (1) and Sch. 1, Art. 11—No court-fee is payable for probate where net assets after deductions mentioned in Sch. 3-B is less than Rs. 1000.

No duty is payable in respect of a grant of Probate or Letters of Administration where the value of the estate, after making the deductions specified in annexure B of Sch. 3 to the Court-fees Act, is less than Rs. 1,000. [P 307 C 2]

A. H. C. Hamilton—for Applicant.

A. E. Ryves—for Board of Revenue.

Judgment.—A question has arisen as to the proper court-fee payable in respect of this estate. It is admitted that the assets of the deceased, if no deductions

are to be made for the debts or funeral expenses of the deceased, exceed Rs. 1,000 in value. On the other hand, it is admitted that if the debts and funeral expenses of the deceased are deducted, the assets are less in value than Rs. 1,000. The administratrix contends that no court-fee is payable. On the other hand, the Board of Revenue contend that duty is payable either on the gross assets or on the net assets after deducting debts and funeral expenses. S. 19, court-fees Act provides, inter alia, as follows;

“Nothing contained in this Act shall render the following documents chargeable with any fee.”

Amongst the documents set forth is:

“Letters of Administration, where the amount or value of the property in respect of which the letters shall be granted does not exceed one thousand rupees.”

It is admitted here that the court-fee, if payable at all, is payable under the provisions of the Act. S. 19-1 provides that no order entitling a petitioner to Letters of Administration shall be made upon an application for such grant until the petitioner has filed in Court a valuation of the property in the form set forth in Sch. 3, and the Court is satisfied that the fee mentioned in No. 11, Sch. 1 has been paid. Sch. 1, No. 11, provides, amongst other things, that Letters of Administration are subject to a fee of Rs. 2 per cent. on the amount or value. Col. 2 is a repetition of S. 19 (viii), providing that duty is payable when the amount or value of the property in respect of which the grant is made exceeds Rs. 1,000 but does not exceed Rs. 10,000. Sch. 3, contains the form of valuation referred to in S. 19-1, together with a form of affidavit to be made by the applicant. Para. 1 is a statement by the deponent that he has set forth in annexure A to the affidavit all the property and credits of which the deceased was possessed at the time of his death. Para. 2 is a statement by the deponent that he has set forth in annexure B all the items which by law he is entitled to deduct. Annexure B mentions, amongst the items which the administrator is allowed by law to deduct, the debts due from the deceased and payable by law out of his assets, together with his funeral expenses. At the end of annexure A, which contains particulars of the gross assets, the following words appear: “Deduct the amount shown in annexure B not subject-

to duty" and concludes with the words "net total."

The argument put forward on behalf of the Board of Revenue is that S. 19 (viii) only permits letters being granted without a court-fee where the amount or value of the property in respect of which Letters of Administration are granted does not exceed Rs. 1,000. It is contended that the Letters of Administration cover all the gross assets, and that, therefore, the duty must be paid on the gross assets; and that, even if this is not so, the duty is at least payable at the rate of 2 per cent. upon the gross assets after deducting such debts and other things as are permitted by law to be deducted. It seems to us that this last contention cannot be sustained, because either the duty is payable, as provided by the express words of the section, upon all the gross assets without any deduction or not at all. If S. 19, Cl. (viii), stood alone, this would appear to be the meaning of the provision, although no doubt it would appear to work some hardship. The duty is really payable by the persons beneficially entitled to the estate. We may give an example of the iniquity that such a provision would appear to cause. A deceased person dies possessed of an estate worth Rs. 900 without any debts. The persons beneficially entitled to the estate pay no duty. Another man dies leaving a gross estate worth Rs. 1,500 but debts amounting to Rs. 600.

The beneficiaries in this case must pay duty upon Rs. 1,500 although their interest in the estate is the same, viz., Rs. 900. It is not easy to see why the beneficiaries in an estate like the last mentioned should even pay duty on Rs. 900, if the beneficiaries in the first mentioned escape. It remains to be considered whether upon the true construction of the Act, notwithstanding any hardship that may arise, duty is nevertheless leviable upon the gross value of the estate. We think that we are bound to read the schedules together with the Act. S. 19 (1), to which we have already referred, expressly provides that the petitioner for Letters of Administration must file a valuation in accordance with Sch. 3, and that the fee is to be paid in accordance with such valuation. Again turning to Sch. 3, which contains the form for giving the valuation, the petitioner for Letters of Administration is stated to be

allowed by law to deduct the debts, funeral and testamentary expenses, and in annexure A, which is headed: "Valuation of the moveable and immovable property of the deceased," the "net total" is made the total after deducting all the items which are set forth in annexure B, and which the petitioner for Letters of Administration is allowed by law to deduct. We think that on the true construction of the Act, no duty is payable where the value of the estate after making the deductions specified in annexure B of Sch. 3, is less than Rs. 1,000. We accordingly hold in the present case that the applicant is not liable for any court-fee.

V.B./R.K.

Order accordingly.

A. I. R. 1918 Allahabad 307

TUDBALL AND PIGGOTT, JJ.

Ram Saran Lal and another — Applicants.

v.

Emperor—Opposite Party.

Criminal Ref. No. 566 of 1917, Decided on 6th August 1917, made by Sess. Judge, Farrukhabad.

Stamp Act, (1899), S. 62—Petition stating terms of compromise between parties and praying for decree does not require engrossed general stamp—Compromise.

The parties to a suit came to an oral agreement and thereupon presented a petition to the Court informing it of the terms of the agreement and praying that a decree might be passed in accordance therewith:

Held: that the petition did not require to be engrossed upon a general stamp, but only required the ordinary court-fee label. [P 308 C 1]

R. Malcomson—for the Crown.

Judgment.—This is a reference by the Sessions Judge of Farrukhabad in the case of two persons, Ram Saran Lal and Sheo Narain, who have been convicted by a Magistrate under S. 62, Stamp Act, and have been sentenced to a fine of Rs. 5 each. The facts may be very briefly put as follows: One of the accused Sheo Narain sued the other accused, Ram Saran Lal, in Suit No. 977 of 1916 in the Munsif's Court at Farrukhabad to recover some money on the basis of a simple mortgage. The parties came to terms out of Court. They agreed "orally" that the defendant was to pay down a certain part of the debt in cash, that the plaintiff was to have a decree for the rest of the money payable in annual instalments, and that in case of any default the plaintiff was to be able to execute his decree at once for the whole sum.

then due. The agreement was not reduced to writing. The parties walked into Court and presented a petition to the Munsif praying that a decree might be passed in the case in the terms of the compromise at which they had arrived out of Court, and in that petition they informed the Court of the terms of the compromise. The Court thereupon passed a decree in favour of the plaintiff, but it sent the petition to the Stamp Officer on the ground that it was an agreement which ought to have been stamped with a general stamp. The Collector directed the prosecution of these two persons for an offence under S. 62 of the Act, and they have now been fined Rs. 5 each.

The learned Sessions Judge is of opinion that the document in question was a petition to the Court requiring only a court-fee stamp; that it was unnecessary to have it engrossed upon a general stamp at all; that the conviction was bad in law and should be set aside. In his referring order the Judge has referred to the decision in *Surju Prasad v. Bhawani Sahai* (1) and has distinguished that case from the facts of the present case. We fully agree with him that the present is a totally different case to the one reported. The Madras High Court in *Reference under Stamp Act, S. 46 (2)* have gone perhaps a little further even than it is necessary for us to go in the present instance, but we agree that the document in the present case was merely a petition to the Court informing it of an agreement into which the parties had orally entered out of Court to compromise the suit, and praying for a decree in the terms of the compromise. As such the document did not require to be engrossed upon a general stamp, but only required the ordinary court fee label. In our opinion the conviction in this case is bad in law. We set it aside and we direct that the fines, if paid, be refunded.

V.B./R.K. *Conviction set aside.*

1. (1878-80) 2 All 481.

2. (1885) 8 Mad 15.

A. I. R. 1918 Allahabad 308

BANERJI AND PIGGOTT, JJ.

Lachmi Narain Dube—Appellant.

v.

Kishun Lal—Respondent.

First Appeal No. 13 of 1918, Decided on 26th June 1918, from order of Sub-Judge, Mirzapur, D/- 31st October 1917.

Provincial Insolvency Act (3 of 1907), Ss. 6 (3), 15 and 16 (1)—Debtor's petition for adjudication—Court is bound to make inquiry before passing order.

Where a debtor's petition alleges facts sufficient if established, to entitle him to present his petition under S. 6 (3) the Court is bound, after completing the necessary inquiries, to come to a decision in respect of the various matters spoken of in S. 15 of the Act and then to dismiss the petition under that section, or to make an order of adjudication as provided for in S. 16 (1) of the Act. [P 308 C 2]

Harnandan Prasad—for Appellant.

Judgment.—This is an appeal by one Lachmi Narain Dube, who had applied to the Court of the Subordinate Judge exercising jurisdiction in the district of Mirzapur to be adjudicated an insolvent. The application was opposed by a creditor; the Court had examined the applicant and had taken certain evidence offered by the objecting creditor. The hearing was then adjourned for reasons which need not be discussed, and it continued to be adjourned over a number of successive dates fixed for the hearing. Finally on 31st October 1917 the case being called on, it was found that the applicant did not appear. The Court thereupon passed the following order:

"Applicant is absent. The application is dismissed for want of prosecution."

It seems to us that this order is not justified either by the circumstances of the case or by the provisions of the Provincial Insolvency Act 3 of 1907. The debtor's petition had alleged facts sufficient, if established, to entitle him to present his petition under S. 6, Cl. (3) of the said Act. After completing the necessary inquiries the duty laid upon the Court was to come to a decision in respect of the various matters spoken of in S. 15 of the said Act and then either to dismiss the petition under the provisions of that section, or else to make an order of adjudication. On this point the words of S. 16 (1) of the Act are clear and mandatory. We therefore allow this appeal and set aside the order of the Court below. We return the record to that Court with orders to re-admit it on to its file of pending applications and to dispose of it according to law. The appeal is not opposed and there is no necessity for us to make any order as to costs.

V.B./R.K.

Appeal allowed.

A. I. R. 1918 Allahabad 309

PIGGOTT AND WALSH, JJ.

Banarsi Das—Defendant—Appellant.

v.

Sheodarshan Das Shastri—Plaintiff—Respondent.

First Appeal No. 170 of 1916, Decided on 12th February 1918, from decree of Sub-Judge, Agra.

(a) **Hindu Law—Alienation—Coparcener acting on behalf of family—Alienation can be impeached by other members not parties to it as being made without authority—Alienation is good as against stranger.**

If one or more members of a Hindu joint family, purporting to act on behalf of the family as a whole make an alienation of joint family property, it is open to those members of the family who did not join in the alienation, to contend that the alienation was made without authority and not for valid necessity or for the benefit of the joint family and that it is not enforceable. But such alienation is good as against a person who is not a member of the joint family and does not claim through the joint family. [P 312 C2; P 313 C1]

(b) **Hindu Law—Religious endowment—Grant of property in favour of Mahant and his heirs for services rendered to temple is not grant to idol or temple.**

A grant of property made under a deed in favour of a mahant of a temple and his heirs for the services rendered by the mahant to the temple is not a grant of the property to the idol or to the temple, and the mahant and his heirs are competent to deal with the property as their private property. [P 316 C2]

(c) **Appeal—Right of Legal representative of deceased party cannot appeal without obtaining order bringing him on record.**

A legal representative of a deceased party is not entitled to appeal as such legal representative without first obtaining an order of the Court bringing him on to the record in that capacity. [P 318 C2]

Lalit Mohan Banerji—for Appellant.

B. E. O'Connor and Peary Lal Banerji—for Respondent.

Piggott, J.—The suit out of which this appeal and the connected Appeal No. 317 of 1915 arise, was brought to enforce a mortgage-deed of 10th January 1881. The property hypothecated was the equity of redemption in a revenue-free grant in village Gadaya Latifpur and 500 bighas of revenue-free land in another village called Khankara. It is recited in the deed itself that the latter of these two properties was already mortgaged with possession to the same mortgagees under a deed of 15th June 1866. Part of the consideration of the simple mortgage now in suit was the redemption of this older usufructuary mortgage on the land in village Khankara. Out of the total consideration of Rupees 10,801 for the deed in suit a sum of Rs. 7,184 was calculated as due on the

usufructuary mortgage of 15th June 1866, and was set apart for the redemption of the said mortgage. One effect therefore of the deed in suit was that the mortgagors became entitled to re-enter into possession of the land in village Khankara which had hitherto been in the possession and enjoyment of their mortgagees. It is further stated in the deed in suit that the revenue-free grant in village Gadaya Latifpur was also mortgaged with possession to the same mortgagees under a deed of 18th October 1865. It is only the equity of redemption which is hypothecated under the deed in suit. It is admitted that this mortgage of 18th October 1865 has never been redeemed. The relief sought in the present suit is to bring to sale the equity of redemption in respect of the revenue-free grant in village Gadaya Latifpur and the entire right, title and interest of the mortgagors in respect of the land in village Khankara. The mortgagors under the deed are as follows:

1. Mahant Lachman Das, disciple of Mahant Hari Das. 2. Khubi Ram and Ram Ratan, sons of Gulab Das. 3. Hargobind, son of Hardeo. The evidence on the record shows that the properties now in question in villages Gadaya Latifpur and Khankara were in the possession in the year 1826 of one Mahant Kesho Das, described as priest of the temple of Sitarajji. They were held by him under revenue-free grants made by the Maharatta Government. This Kesho Das appears to have had a number of chelas or disciples, and it seems clear from the record that he himself belonged to a celibate order of religious ascetics. Kesho Das died somewhere about the year 1828 and, under circumstances which will require to be further considered, he was succeeded in possession of the properties in suit by two persons, Hari Das and Gulab Das. The former of these took the title of Mahant, lived as a celibate and would seem to have succeeded Kesho Das in the office of priest. Gulab Das was a married man and brought up a large family, seven sons of his being shown in the pedigree the correctness of which has been admitted. Hari Das, however adopted chela, and as his eventual successor in the Mahantship, Lachman Das, one of the sons of Gulab Das. This is the Lachman Das whose name appears as the first of the mortgagors in the deed in suit. Of the remaining mortgagors two are sons of Gulab Das, while Hargobind

is a grandson of Gulab Das, his father Hardeo having presumably died before the execution of the deed in suit. There is a recital in the same deed to the effect that three other persons interested in the mortgaged property as descendants of Gulab Das are "not present here," and the executants of the deed undoubtedly purport to act for and on behalf of these alleged absent members of the family and to deal with the property as a whole, including the shares of the said absent members.

The three persons thus specified are Har Prasad, an own brother of the executant Hargobind, Bhola, another grandson of Gulab Das whose father Baldeo we must presume to have died prior to the execution of this document, and Bal Kishen, another son of Gulab Das. There remains one other son of Gulab Das called Bhupal, who is not accounted for in the above statement of facts. His name neither appears as an executant of the mortgage deed in suit nor in the recital of those members of the family on whose behalf the executants of the deed purport to act. In the absence of any evidence to the contrary it seems a fair presumption that Bhupal had died prior to the execution of this deed, and there is no evidence on the record to prove the contrary. The nearest the defendants have been able to get is the production of certified copies of certain village records which purport to show Bhupal as alive in the year 1879. This does not prove that he was alive in 1881, and does not seem to me to outweigh the presumption of his death which may reasonably be drawn from the wording of the deed in suit. It is an admitted fact in the case that Lachman Das adopted as his chela another grandson of Gulab Das, namely, Raghunath Das, son of Khubi Ram, one of the executants of the deed in suit. This Raghunath Das similarly became a celibate Mahant and succeeded Lachman Das in the office of Mahant in connexion with the temple of Sitaramji. Raghunath Das has since departed from the tradition of the family by adopting as his chela a person named Banarsi Das who is an outsider, that is to say, not a descendant of Gulab Das, and in respect of whom it is alleged, though the matter has not been inquired into in the present case, that he is disqualified from succeeding to the Mahantship by the fact that he is a house-holder and a married man.

At any rate, on 29th May 1907, Mahant Raghunath Das executed a deed by which he purported to transfer all his rights, including both his personal property and his office as Mahant and whatever interest he possessed as priest, manager or trustee of the temple of Sitaramji to the aforesaid Banarsi Das. A suit was brought by Banarsi Das on the strength of this document in which he impleaded all the descendants of Gulab Das, together with certain persons alleged to be transferees of property appertaining to the temple, but not the mortgagees under the deed now in suit or any representative of the said mortgagees. The suit was resisted upon a variety of grounds and after it had been dismissed by the Court of first instance it came before this Court as First Appeal No. 307 of 1910, decided on 28th October 1912. The learned Judges of this Court expressly declined to determine the question whether the property in suit in that litigation which included the property now in suit was or was not trust property belonging to the temple of Sitaramji. Their decision proceeded upon this line of argument either the property in suit was trust property as alleged by Banarsi Das, that is to say, appertained to a trust of which Mahant Raghunath Das was or had been the sole manager and trustee or it did not. If it did not Banarsi Das obviously had no case at all: assuming for the sake of argument that it did there was no evidence on the record to satisfy the Court that Raghunath Das had any right to nominate his successor at his own free will and pleasure still less to transfer the office of Mahant with the rights and duties of trustee and manager of the temple property, to another person during his own lifetime.

The present suit was instituted on 29th March 1910, that is to say, before the declaratory suit brought by Banarsi Das had been decided even by the Court of first instance. The foregoing recital of facts is however necessary to the understanding of the pleadings in the present suit and in the view which I take of the case a proper appreciation of these pleadings is absolutely essential to the determination of the questions raised by these appeals. It may be said at once that the plaintiff is a transferee of the rights of the original mortgagees under the deed in suit and also under the usufructuary mortgage of 18th October 1865. The

determination of the present suit has as a matter of fact been delayed by the circumstance that a plea raised by the defendants against the validity of the plaintiff's document of transfer was accepted in the first instance by the trial Court but the decision on this point was taken to this Court in appeal and was disposed of by this Court on 17th of November 1913 (vide First Appeal No. 21 of 1912 the record of which has been before us), with the result that the validity of the plaintiff's document of title was affirmed. It seems just worth while to note at once that the plaintiff is himself the trustee and manager of another religious endowment connected with another temple at Bindraban, and that the money which he has embarked on this speculation presumably comes from the surplus profits of the trust in his hands. It is entirely superfluous therefore to allow any considerations as to the feelings of the Hindu public with regard to the sanctity of temple endowments to interfere with the consideration of the questions of law involved in this suit. If the plaintiff succeeds he will bring this property to sale for the benefit of another religious endowment. Nor is it necessary that we should trouble ourselves overmuch with any considerations as to the general equities of the case. The plaintiff is a speculator who has bought up a disputed claim for what it may be worth, while the defendants are in the position of persons who have raised money upon property under a representation that they had every right to do so and who are now seeking to repudiate the debt on the ground that the property hypothecated was not theirs to deal with. The array of defendants as originally impleaded was as follows:

Defendant 1 was Banarsi Das, who is described in the plaint simply as "disciple of Raghunath Das." The next six defendants were representatives of the family of Gulab Das being his grandsons, great-grandsons or great-great-grandsons, together with the widow of a deceased descendant who was presumably impleaded as a matter of precaution. Defendant 8 was stated to be an auction-purchaser of whatever rights Raghunath Das had possessed in the property in suit while defendant 9 was the successor-in-title of the original mortgagee, who had transferred his rights to the plaintiff. Subsequently, three more de-

fendants were added: two of these were alleged to be also transferees of the rights of Raghunath Das in the property in suit; and Raghunath Das himself was also impleaded, apparently at the suggestion of the Court. He is described as

"Mahant Raghunath Das, a disciple of Mahant Laxman Das, gaddi-nashin and managing trustee of the temple of Thakur Sri Sitaramji Maharaj, placed at Mauza Gadaya Latifpur."

In the petition by which Raghunath Das was impleaded the plaintiff carefully refrained from admitting that Raghunath Das was in any way a necessary party to the suit. He admitted him to be the managing trustee of a certain temple; but his case was throughout that the property in suit formed no part of the endowment of that temple, or of the trust property in the hands of Raghunath Das. The property in suit was alleged by the plaintiff to be the personal property of the original mortgagors, and Banarsi Das was impleaded, instead of Raghunath Das, on the ground that the latter's deed of 29th May 1907, whatever might be its effect as regards the trusteeship and the trust property, did operate to transfer in favour of Banarsi Das whatever rights Raghunath Das possessed in any personal property of his own. In a petition which he presented to the Court after he had been impleaded, Raghunath Das disclaimed all interest in the litigation. He apparently intended to support the contention of Banarsi Das that the property in suit was not merely trust property, but appertained to an endowment in favour of the temple of Sitaramji of which Raghunath Das had been the sole trustee and manager, until he transferred his rights to Banarsi Das. Those defendants who resisted the suit raised a variety of pleas; but the point to be noticed for my present purpose is that there was a marked difference in the position taken up by Banarsi Das on the one hand, and by the descendants of Gulab Das on the other. Both these parties took the plea that the property in suit was trust property appertaining to the temple aforesaid, and as such inalienable; but they were as much at variance amongst themselves as they were with the plaintiff. Banarsi Das expressly pleaded that the property in suit appertained to a trust of which he was himself the sole manager by appointment in succession to Raghunath Das. He pleaded that

S. N. Das
Advocate High Court
Jammu & Kashmir

"Radha Ballabh and other defendants, the heirs of Gulab Das, have no interest in the property."

On the other hand, those of the descendants of Gulab Das who contested the suit denied that Banarsi Das had any interest in the matter. They not merely denied that he had succeeded to the interests of Raghunath Das, whatever they may have been, in the property in suit; but they set up a trust under which the descendants of Gulab Das were joint trustees along with whatever Mahant for the time being had succeeded to the rights of Hari Das and of Lachman Das.

They pleaded, and in view of the position taken up by them they were clearly entitled to plead, that Raghunath Das was a necessary party to the suit, and that his absence from the array of original defendants was a fatal objection to the maintainability of the entire suit, inasmuch as he had been impleaded after the expiration of the special period of limitation prescribed by S. 31, Lim. Act (9 of 1908), within which the present suit was instituted. The learned Subordinate Judge fixed a number of issues, and one of these issues was whether Banarsi Das or the defendant Raman Das (a grandson of Hargobind, one of the executants of the mortgage-deed in suit) was the lawful successor to Mahant Raghunath Das. In the end however the Court below came to the conclusion that this was an issue which arose only as between two of the defendants and did not require to be decided in order to the determination of the suit. He overruled on various grounds all the pleas raised by all the defendants, except the plea taken by the descendants of Gulab Das to the effect that the shares of those members of the family who had not joined in the execution of the mortgage-deed in suit were not affected by the mortgage and could not be brought to sale in satisfaction of the same. On this basis he has given the plaintiff a decree for the full amount claimed by him, but enforceable only as against an undivided 17/24 ths share of the property in suit. All the defendants except Banarsi Das have submitted to this decree, and I regard it as most important to insist upon the fact that the appeal now before us is by Banarsi Das alone. On the other hand the plaintiff has filed a separate appeal No. 317 of 1915, in which he asks that the decree of the Court below be modified

by making it enforceable as against the whole of the mortgaged property. This appeal I propose to deal with in a separate judgment. The memorandum of appeal presented by Banarsi Das is a somewhat prolix and argumentative document, but it has been agreed before us that in substance only three points are raised:

(1) It is contended that the property in suit is trust property, belonging to the idol worshipped in the temple of Sitarajji at Gadaya Latifpur, and to no other person whatsoever, so that the executants of the mortgage deed in suit had no right to alienate the same and it cannot be brought to sale in execution of the mortgage decree. (2) It is contended that Mahant Raghunath Das was a necessary party to the suit, and that the suit must fail on the mere ground that he was impleaded after the expiration of the prescribed period of limitation. (3) A plea is taken, in the alternative, to the effect that, on the view of the facts taken by the Court below and assuming that the joint family formed by the lineal descendants of Gulab Das were owners, or part owners of the property in suit, then it should be held as a matter of law that the executants of the mortgage-deed had no right to hypothecate either their own shares or the shares of any person in the joint ancestral family property, and that this ground alone would be sufficient to warrant the dismissal of the plaintiffs' suit.

I propose to take these points in the reverse order, because the last two can, in my opinion, be very briefly disposed of. I do not think there is any force in the third plea, and I propose to deal with it more in detail in my judgment on the cross-appeal filed by the plaintiff. For the purpose of the appeal now under consideration it is sufficient to say that this plea is not open to Banarsi Das. He is not, never was, a member of the joint family formed by the descendants of Gulab Das. If one or more members of a Hindu joint family, purporting to act on behalf of the family as a whole, make an alienation of joint family property, it is, of course, open to those members of the family who did not join in the alienation to contend that it was made without authority, that it was not made for valid necessity, or for the benefit of the joint family, and that it is not enforceable. As against a person like Banarsi Das,

who is not a member of the joint family and does not claim through the joint family, the alienation is good. In dealing with the question of limitation I have one further point to note. A document which is on this record at p. A12 shows that Raghunath Das died on 19th January 1913, during the pendency of this suit in the Court below. The plaintiff made no attempt to have any person brought on the record as successor to Raghunath Das; and from his point of view he was obviously right in not doing so. He had contended throughout that Raghunath Das was not a necessary party to the suit and that any interest which he had ever possessed in the property in suit had passed to other hands. Banarsi Das in his memorandum of appeal to this Court says that he files his appeal in the capacity of trustee of the wakf property belonging to Thakur Sitaramji, representing Raghunath Das in that capacity.

He has never applied to this Court to be brought upon the record as successor to Raghunath Das. Had he made such an application, it seems clear to me that it could not have been granted without some further inquiry, seeing that the right of succession to the office of Mahant and to the trusteeship held by Raghunath Das was a matter in controversy in this very suit. The document to which I have already referred does, no doubt, afford some evidence in support of the contention that Banarsi Das, whatever his rights may be, has succeeded in obtaining effective possession of the temple and of any property appertaining to the temple other than the property now in suit. At the same time it seems clear that no litigant has a right to assume to himself the position of legal representative of a deceased litigant, without making an application to the Court in proper form and obtaining the orders of the Court thereon. In the suit itself the position taken up by Banarsi Das was that he had already taken the place of Raghunath Das as manager and trustee of the temple in virtue of the transfer of 29th May 1907. The plaintiff impleaded Raghunath Das as manager and trustee of the temple, but denied that the property in suit had any concern with the trust of which Raghunath Das was the manager. The question of limitation, therefore if it can be raised at all by Banarsi Das in this appeal, depends for its determination on the de-

cision of the Court in respect of the main question. If the property in suit is found to belong to a trust of which Mahant Raghunath Das was on the date of the institution of this suit the sole trustee and manager, the suit will fail on its merits, and it must also be held to be barred by limitation on the ground that the trustee was impleaded after the expiration of the limitation period. On a contrary finding it would follow that Mahant Raghunath Das had on the date of the institution of the suit, no interest in the property in question and was not a necessary party.

This was the position taken up by Raghunath Das and by Banarsi Das himself in the Court below and I very much doubt if the appellant can be permitted to resile from it now. I may say further that after carefully considering the memorandum of appeal filed by Banarsi Das in connection with this question of limitation, I am by no means satisfied that it is incumbent upon us at all to hear Banarsi Das on the merits. He does not appeal in his personal capacity as Banarsi Das, defendant 1 in the suit. He expressly claims to appeal as the representative of Raghunath Das, the person subsequently impleaded as defendant 10 in the suit. He has no doubt, adopted this attitude in the hope that it may lend force to his plea of limitation; but he has neglected to observe that he is not entitled to appeal as a legal representative of a deceased defendant, without first obtaining an order of the Court bringing him on to the record in that capacity. He has not amended his pleadings in any way in consequence of the decision of this Court in First Appeal No. 307 of 1910, and must be taken to stand by the position originally taken up by him that the trusteeship of the temple had been transferred to him prior to the institution of this suit by the deed of 29th May 1907. In the absence of any amended pleading on his part or of any application from him asking to be brought upon the record as the legal representative of Mahant Raghunath Das after the death of the latter, and of any order to this effect from the Court it seems to me that his appeal as filed is not maintainable at all.

It is only because this point was not properly brought out in the course of argument before us that I prefer to pass on to the consideration of the main plea

raised by Banarsi Das instead of throwing out his appeal on this ground alone. With regard to this question whether the property in suit forms part of a religious endowment, there is a great deal of evidence of one kind or another on the record and I quite admit that portions of that evidence have not been satisfactorily dealt with in the judgment of the Court below. At the same time it seems to me that the issue as between Banarsi Das and the plaintiff (and these are the only parties with whom we are concerned in this appeal) lies within a very narrow compass. I find no force in the contention, pressed upon us in argument that the property in suit never belonged to Mahant Kesho Das but was, from the very outset a religious endowment, the true owner of which was the idol of Takur Sitaramji worshipped in a particular temple. It is admitted that the revenue-free grants by the Maharatta Government in respect of the lands in both the villages in suit were at one time in existence in writing, but the grant in respect of village Gadaya Latiapur is not forthcoming. I find nothing on the record to lend colour to the suggestion made on behalf of the appellant that this document is in the hands of the plaintiff and is being wilfully kept back by him. It is expressly referred to in one of the older documents on the record as having been lost. What is described in the judgment of the Court below as "the original sanad of muafi mouza Khankara, dated 10th Jamadi-ul-awwal 1321 Hijri" is on this record and has been produced by the plaintiff.

It is a very ancient document and partly in consequence of the defective processes employed in our Courts for the binding of records, is now in an extremely damaged condition. The official translators of this Court have been compelled to report that they are unable to prepare any intelligible translation of the document. The learned Judge of the Court below is a Mahomedan gentleman; I have no doubt that he was quite capable of reading the document in question with comprehension, and it would appear that he was able to do so while its condition was less dilapidated than it is at present. He states in his judgment that this sanad confers the property as a personal grant or muafi from generation to generation and I can see no reason why we should not be content to accept this account of its

content. There is nothing unusual or inconsistent with Hindu religious ideas in the making of a grant to the Mahant of a temple for the personal enjoyment of himself and of his successors after him. No doubt the person making the grant is influenced by the fact that the grantee is the priest of a temple and performs religious services in connection therewith, that is no reason why a grant made for the enjoyment of the Mahant personally should be construed as a grant in favour of the idol as a juristic personality. Moreover there is one consideration which seems to me decisive against the appellant as regards this part of the case. The one document in the appellant's favour, without which he would have no arguable case at all, is the bhetnama (deed of endowment, or of dedication) executed by Mahant Kesho Das on 9th May 1826. At the time when he made that grant Kesho Das obviously regarded himself as having full right of disposal in respect of the property dealt with therein. The appellant himself asks us to regard this document as creating an endowment in favour of the temple, or of the idol as a juristic personality; and this position is inconsistent with the suggestion that the endowment was already in existence, or that the idol was already the owner of the property and Mahant Kesho Das nothing more than a trustee. The one difficult point in the case is the meaning and the legal effect of this document itself.

The learned Subordinate Judge has brushed it aside somewhat lightly with the remark that it was never acted upon. I freely concede to the appellant that this is not a satisfactory way of dealing with it. If the Court has before it a document which undoubtedly created a trust or religious endowment, it is not a sound position to take up that the document became of no effect as soon as the trustee or trustees appointed thereunder began to commit breaches of trust in respect of the properties thus placed in their hands. I think the document requires to be considered, both in connection with the pleadings of the parties to this appeal, and in connection with the available evidence bearing on the position of Kesho Das at the time, and the events immediately following on his death. We have it from Mahant Kesho Das that he had a good many chelas or disciples, and he was obviously anxious to arrange that the pro-

party in his hands should pass peaceably after his death into the hands of the two particular persons whom he desired to nominate as his successors. It is to be noted that he described them somewhat differently in the deed in question. He speaks of Hari Das as "my disciple and of Gulab Das as my adopted son." Seeing that Kesho Das was certainly a very old man when he executed this document and that he died within two years of its execution, I think that we may take it that Gulab Das was already a family man in the year 1826, was married and had begotten children. The fact that he is described as "my adopted son," and not as "my disciple," suggests that Mahant Kesho Das himself was doubtful whether Gulab Das would be accepted by Hindu religious feeling as a qualified successor to himself in the office of Mahant and of temple priest.

At the same time he was obviously anxious to make provision for Gulab Das and his family and to insure for their benefit a right to share in the profits of the property in question. It must be remembered further that he held this property under revenue-free grants. Those grants might or might not be confirmed by the British Government. The property itself, that is to say, the share in Gadaya Latifpur and the land in village Khankara, Mahant Kesho Das might perhaps dispose of by will so as to secure peaceable succession to the same for the benefit of his legatees; but the value of the property would be greatly diminished if the Government refused to continue the revenue-free grant and proceeded to assess the land to revenue. I take it that these considerations dictated the peculiar form of the document which we have to consider. It is curiously worded and one part of it is difficult to reconcile with another. In one place the Mahant purports to make a gift or dedication of the property in question (which by the way includes other property besides that now in suit) to Thakur Sitaramji as a juristic personality, and merely to appoint Hari Das and Gulab Das to perform the worship and services of the idol. Further on however he speaks of them as his "donees" and says that while they should be careful to keep up the worship and services of the Thakurji, they are to regard themselves as owners of the gifted property and to enjoy the same as such.

Another point which was not noticed in the course of argument before us, but which seems to me of some significance, is that the idol of Thakur Sitaramji spoken of in this document does not seem to be identical with the idol of which according to the plaintiff, Mahant Raghunath Das was the managing trustee on the date of the institution of the suit. The latter is in a temple at Mauza Gadaya Latifpur; but in the deed of 1826 Mahant Kesho Das describes himself as priest of the temple of Sitaramji situated in Mohalla Pulan in the town of Bindraban, and there is nothing in the document to suggest that the "Thakur Sitaramji" subsequently referred to is any other than the idol worshipped in this temple in the town of Bindraban. After the death of Mahant Kesho Das the question of the continuance of this revenue-free grant in favour of his legatees or successors was considered by the British Government and was the subject of a good deal of correspondence, extracts from which are to be found printed in this record. The revenue-free grant was continued; but it is beyond question that neither the temple, nor the idol of Thakur Sitaramji regarded as a juristic personality, was ever entered in the revenue papers as the holder of the grant. At p. A-6 of the record is an extract from the register of revenue-free grants relating to village Khankara.

The name of the holder of the grant there given is "Hari Das Bairagi." There is a note that it was granted for the love of God and for the expenses of Thakurji in "Gadaria Ilaka Farrah." The name "Gadaria" in this place would seem to be a variant of the name of Gadaya Latifpur. A similar paper of the year 1868 relating to this latter village shows that the British Government finally remitted the revenue assessable on this village in favour of Hari Das and Gulab Das, heirs to Kesho Das. The word "heirs" is to my mind of great significance. Under the heading 'designation of the tenure' appears the following entry:

"for the maintenance of the priest and the expenses of the temple of Thakur Sitaramji."

In the mortgage-deed of 18th October 1865, Gulab Das and Lachman Das, the successor of Hari Das, speak of the property in Gadaya Latifpur as constituting a muafi in perpetuity granted by Maharaja Sri Madho Rao Sahib Bahadur of

Gwalior for generation after generation and upheld as such by the British Government, and as having been "in our proprietary possession up to this day." They unquestionably assume to themselves the right to deal with this grant as their own and to alienate it in such manner as they think proper. At the same time, while putting the mortgagees in possession, they reserved to themselves the right to receive one rupee daily from the mortgagees, "for the expenses of the temple of Sitaramji Maharaj situated in the village aforesaid." Now there has been much litigation arising out of this stipulation, and the question of the position of the mortgagors and mortgagees under this deed of 1865 does not come to us precisely as res integra in the present litigation. The documents which especially requires consideration are a judgment of the District Judge of Agra, dated 19th February 1892, at p. 10-R of this book, and a judgment of the same Court, dated 12th July 1912. With regard to the former of these documents it is to be remarked that the decision of the District Judge was not affirmed by this Court on appeal: there was an order of remand which resulted eventually in a judgment (which the parties have neglected to print) by which the decision of the District Judge was considerably modified.

The net result of this litigation has been that this allowance of one rupee per diem has been held not to appertain to any trust or endowment, either in favour of the temple or in favour of the idol worshipped therein, but to be a personal right reserved to themselves by the mortgagors. Further, it has been held that the successors of the original mortgagors are entitled to recover this allowance piecemeal in certain definite shares; that is to say, a right to receive one-half of the allowance has been affirmed in favour of the successor to the Mahantship, the other half the heirs of Gulab Das have been permitted separately to recover for the benefit of the joint family to which they belong. The decision of the District Judge of Agra in the litigation of 1912 seems to me of particular importance. I do not say that it operates as res judicata as between Banarsi Das and the plaintiffs. But even as between them it is relevant evidence, as an instance in which a certain right was contested and was affirmed by the Court. In that litigation the pre-

sent plaintiff, as successor of the original mortgagees, was arrayed on one side along with Raghunath Das, while the descendants of Gulab Das, who were claiming a half share in the arrears of the daily allowance, were arrayed upon the other.

In deciding that the heirs of Gulab Das were entitled to receive the half share claimed by them, the learned District Judge expressly proceeded upon a finding that the mortgagors in the deed of 1865 had hypothecated their personal property, and not endowed property belonging to the temple for the services of which it was said that the allowance ought to be expended. It seems to me that this finding is conclusive as between the plaintiff on the one hand and the descendants of Gulab Das on the other, and this may be the reason why the latter have not seen fit to contest this appeal. The position of Banarsi Das is not quite the same; but we must limit ourselves to a consideration of the case as it stands between the appellant and the respondent now before us on their own pleadings, and on the evidence on the record it seems to me that Banarsi Das has no substantial case. The one document in his favour is the bhetnama of 9th May 1826, and that document, if it is evidence of any kind of trust, is no evidence at all of the particular trust alleged and contended for by Banarsi Das in this case. On any possible interpretation of that deed, it does not create a trust the benefits of which are to go wholly to the temple of Thakur Sitaramji, still less to a temple of that deity situated in Gadaya Latifpur; still less does it create a trust of which the sole manager and trustee shall be the Mahant of the temple for the time being. If this document can be construed as creating any sort of a trust, then it is a trust for the maintenance of the worship of the idol in a certain temple, but principally for the benefit of the trustees themselves, and these trustees are Mahant Hari Das and his successors after him and Gulab Das and his descendants after him. If I felt that this appeal could not be disposed of without going further into the question of the possible creation of a trust of this nature, and the legal consequences which would follow in the event of such a trust being proved, I should have a good deal more to say; but I do not think this question is now in issue.

Mahant Banarsi Das (as I observe that he now calls himself) set up a trust for the benefit of the idol Thakur Sitaramji, of which he was himself the sole manager and trustee. The plaintiff admitted the existence of a trust in favour of the idol of which Mahant Raghunath Das was the sole manager and trustee, but denied that the property in suit appertained to that trust. So far as the parties now before us are concerned, they went to trial on this issue and the one piece of evidence which can be seriously relied on in favour of Banarsi Das is the document of 1826, which is no evidence that the property in suit belongs, or ever belonged, to a trust exclusively in favour of the idol in question, or of which the Mahant of the temple for the time being was the sole trustee. All the other evidence on the record is entirely against Banarsi Das, and in favour of the contention that the mortgagors of 1881 were right in saying that they had a power of disposal in respect of the property dealt with by the deed in suit. If it be suggested that I am taking too narrow a view of the pleadings, and that Banarsi Das should be allowed at this stage to set up, at least by way of an alternative pleading, the alleged rights of the descendants of Gulab Das by way of *jus tertii*, although he had expressly denied the existence of those rights in his written statement, even then it seems to me that the position is clear. If Banarsi Das can be heard to plead the rights of the descendants of Gulab Das, he cannot raise on their behalf any plea which would not be open to them.

And in my opinion they are precluded by the decision of the District Judge of Agra, of 12th July 1912, from asserting that the property now in suit, or rather the half share in that property with which they are concerned, is not their personal property. They have obtained, as against the present plaintiff, a decree which proceeded upon an express finding to the above effect, and which without that finding would have been impossible. On these grounds I am of opinion that there is no force in this appeal, and that it must be dismissed with costs.

Walsh, J.—I agree in the order dismissing the appeal. I do so with some hesitation, solely because I entertain an uncomfortable feeling that the deed of

1826 created a religious endowment of property which could not thereafter be legally alienated under any circumstances except for the purposes of such endowment, and that we are impliedly sanctioning what may be described as a prescriptive right to divert trust property from its original purpose without the approval of any Court. I think the property and those in possession of it have long ceased to pay any but a perfunctory and inconsiderable tribute either in spirit or in cash to the wishes of the original founder of the endowment. I recognize, however, the force of my brother's observation with reference to the feelings of the Hindu public in this particular case, and having regard to the special circumstances and to the special form in which the case now comes before us in appeal, I think that the order proposed does substantial justice between these parties.

By the Court.—The appeal is dismissed with costs.

V.B./R.K.

Appeal dismissed.

A. I. R. 1918 Allahabad 317

RICHARDS, C. J. AND BANERJI, J.

Madan Lal and others—Defendants—Appellants.

v.

Manzur Ahmad—Plaintiff—Respondent.

First Appeal No. 57 of 1917, Decided on 8th November 1917 from order of Sub-Judge, Badaun, D/- 18th April 1917.

(a) Jurisdiction—Civil and Revenue—Parties admitting existence of plot of land under occupancy rights—Each party claiming to be entitled to holding—Suit is cognizable by Civil Court.

Where both parties come into Court admitting that there is a plot of land held under occupancy rights, and each party claims to be entitled to the holding, the suit is cognizable by a civil Court. [P 318 O 2]

(b) Agra Tenancy Act (1901), Ss. 98 and 167—Suit for declaration that defendant and other persons are zamindars and plaintiff is occupancy tenant—Jurisdiction of civil Courts is barred.

Where the plaintiff alleges that the defendants and other persons are his zamindars, and that he is their occupancy tenant and seeks a declaration to that effect, the cognizance of the suit by the civil Courts is barred by Ss. 95 and 167. [P 318 C 1]

Narayan Prasada Asthana—for Appellants.

Agha Haidar—for Respondent.

Judgment.—This appeal arises under the following circumstances. The plaintiff in the present suit was sued in the

Revenue Court for ejectment from two plots. He pleaded with regard to one plot that he was one of the proprietors, and with regard to the other plot that he was the occupancy tenant. The defendants on the other hand asserted that the present plaintiff was their sub-tenant. The Revenue Court referred the defendant to the civil Court to establish his alleged title as proprietor. The present suit was then instituted by the plaintiff and he claimed relief not only in respect of his alleged proprietary right but also in respect of his occupancy rights. The learned Munsif states as follows:

"Issues are framed on the pleadings and the statements of the parties' pleaders or parties and their pairokars themselves and the parties and their pleaders are bound by their statements. Those statements must be treated as though incorporated in the pleadings themselves. Now in this case it has been admitted by the plaintiff's special attorney and pairokar that the defendants were the plaintiff's zamindars of the plots, the subject of dispute in this issue, along with certain other zamindars and that the plaintiff was the occupancy tenant of them and not a sub-tenant merely."

On this basis the learned Munsif went into the case and decided so much of the plaintiff's claim as was made in respect of proprietary rights in favour of the plaintiff, but he dismissed the rest of the claim on the ground that the civil Court could not entertain the matter having regard to the provisions of Ss. 167 and 95, Agra Tenancy Act. The learned Subordinate Judge seems to have thought that the claim in respect of occupancy rights was a "claim between two rival claimants to an occupancy holding." He in no wise holds that the special attorney of the plaintiff did not make the admission mentioned by the Munsif as to what the plaintiff's case was and a review of the surrounding circumstances of the present case shows that the plaintiff's real claim was as stated by his special attorney. If the plaintiff had come into the civil Court in respect of the holding alleging that the defendant and other persons were his zamindars and that he was their occupancy tenant and asking for a declaration to that effect, it would clearly be a suit which would be barred by the provisions of the Tenancy Act to which we have referred. The plaintiff's claim in the present suit is a very different class of claim to that which is made where both parties come into Court admitting that there is a plot of land

held under occupancy rights and each party claims to be entitled to the holding. In the present case both parties were claiming the position of zamindar and occupancy tenant according to what suited their interest. These were matters exclusively within the jurisdiction of the Revenue Court. The real question in the present case (apart from the question decided by the Munsif) was whether or not the plaintiff was the sub-tenant of the defendant. All questions except the question of proprietary right decided by the Munsif can be tried by the Revenue Court. We allow the appeal, set aside the order of the learned Subordinate Judge and restore the decree of the Court of first instance with costs in all Courts.

V.B./R.K.

Appeal allowed.

A. I. R. 1918 Allahabad 318

BANERJI, J.

Ishwari Dutt—Accused—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 332 of 1918, Decided on 6th July 1918, from order of Dist Magistrate, Garhwal, D/. 6th May 1918.

Criminal P. C. (5 of 1898), S. 110—Person possessing influence and promoting litigation is not so dangerous or desperate within S. 110.

The mere fact that a man has influence with the patwaris and promotes litigation, without there being anything to show that he habitually takes or attempts to take money from litigants by offering to them threats to support their opponents, would not raise the inference that he is so dangerous or desperate that his being left at large would be hazardous to the community within the meaning of S. 110. [P 319 C 1]

C. R. Alston and *K. N. Laghate*—for Applicant.

R. Malcomson—for the Crown.

Judgment.—The applicant *Ishwari Dutt* has been ordered to furnish security for good behaviour. The charge against him was that he habitually committed extortion and was so desperate and dangerous that his being at large without security was hazardous to the community. No instance of his having committed extortion has been found or established in fact, no instance has been given in which this man was said to have committed extortion or attempted to commit extortion. All that is proved against him is that he promotes litigation and has considerable influence with patwaris. Assuming the

evidence on these points to be true, they would not necessarily raise the inference that he committed extortion or attempted to do so. In promoting litigation he may have been supporting the right party. If, of course, it was shown that he habitually took or attempted to take money from litigants by offering to them threats of supporting their opponents, that would be a case of extortion or attempted extortion. But no such instance, as I have said above, has been found against him. His having influence with the patwaris would not raise the inference that he was so dangerous and desperate that his being left at large would be hazardous to the community. It must be shown that he had such a reckless disregard of the safety of the person and property of his neighbours that his being at large would be detrimental to the community, and if that were proved he would be a man of a desperate and dangerous character within the meaning of S. 110. This was held in *Wahid Ali Khan v. Emperor* (1). The present case does not come within the purview of any of the clauses of S. 110, and therefore the order passed against the accused was not justified. I accordingly set it aside and direct that Ishwari Dutt be released if he is in custody and that his security bonds be discharged if security has been furnished.

V.B./R.K.

Order set aside.

1. (1907) 11 O W N 789=6 Cr L J 1.

A. I. R. 1918 Allahabad 319

RICHARDS, C. J. AND BANERJI, J.

Suraj Bhan—Defendant — Appellant.

v.

Hashim Begam and others—Plaintiffs — Respondents.

Second Appeal No. 299 of 1916, Decided on 10th April 1918, from a decree of Dist. Judge, Moradabad.

Contract Act (9 of 1872), S. 70—Purchaser paying more amount than left with him to mortgagee—Vendee is not entitled to set it off in suit for recovery of unpaid consideration by vendor.

Under a sale deed executed by the plaintiff in favour of the defendant, a sum of money was left with the defendant for payment to a creditor of the plaintiff who held a mortgage over some other property belonging to the plaintiff. Defendant paid off the mortgage with a sum in excess of that which was left with him. In a suit by the plaintiff to recover a portion of the consideration for the sale which had been left unpaid:

Held: that the defendant could not be allowed to set off the amount paid by him to the plain-

tiff's creditor in excess of the amount that was left with him inasmuch as the excess payment was not obligatory upon the defendant.

[P 320 C 1]

Kailas Nath Katju and Tej Bahadur Sapru—for Appellant.

S. M. Sulaiman—for Respondents.

Judgment.—The point which arises in this appeal is as follows. Certain immovable property was sold for a considerable sum of money. In the sale deed the consideration is stated to have been received in a certain way (as per details at the foot of the deed). According to this detail the vendee was to retain a sum of Rs. 8,150 for payment to a certain creditor of the vendors who had a mortgage upon other property belonging to the vendors and which was no part of the property sold to the vendee. Some delay seems to have taken place in the registration of the deed and as a consequence the vendee alleges that he did not pay the Rs. 8,150. Eventually when he succeeded in getting the sale deed registered he went to the creditor and offered him the Rs. 8,150, which the creditor refused to receive because further interest had in the meantime accrued amounting to the sum of Rs. 749 or thereabouts. The present suit was instituted by the plaintiffs to recover the portion of the purchase-money which they alleged had not been paid. The defendant admitted that a portion of the purchase-money had not been paid but he claimed credit as against the amount that remained unpaid for the sum of Rs. 749 interest which he alleged he had paid the creditor of the vendors. Both the Courts below held that assuming that the defendant had paid the creditor the extra sum of Rs. 749 for the interest which had accrued he could not plead this as a set off against the plaintiff's claim for the unpaid purchase-money upon the ground that there was no obligation on the vendee to pay any money to the creditor except the Rs. 8,150, which had been left with him by the vendors. In second appeal to this Court it has been urged that the view taken by the Courts below was incorrect and S. 70, Contract Act, is relied upon. That section provides that

"where a person lawfully does anything for another person or delivers anything to him not intending to do so gratuitously and such other person enjoys the benefit thereof the latter is bound to make compensation to the former in-

respect of or to restore the thing so done or delivered."

We do not think that this section applies to the circumstances of the present case. It was admitted at the Bar that if the sale deed had been silent about payment to the creditor of the vendors and that the vendee of his own motion had paid off the creditor he could not have pleaded such payment as a set off against the purchase money. We think that exactly the same reasoning applies to the present case. According to the sale deed the only sum which the vendee was requested to retain out of the purchase-money and pay to the creditor was the sum of Rs. 8,150. The payment of the balance was a payment gratuitously made. We have already pointed out that the property mortgaged to secure the sum due to the creditors was no part of the property sold. It may be of course that the plaintiffs have benefited by the payment to the creditor but this by itself is no sufficient ground to entitle the defendant to set it off against the plaintiffs' claim. We dismiss the appeal with costs.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1918 Allahabad 320 (1)

BANERJI, J.

Deo Saran Tewari—Accused—Applicant.

v.

Emperor—Opposite Party.

Criminal Ref. No. 228 of 1918, Decided on 4th April 1918, made by Sess. Judge. Gorakhpur.

Criminal P. C. (1898), Ss. 195 and 487—Disobedience to lawful summons—Conviction by Magistrate whose order disobeyed is illegal and must be set aside.—Penal Code (45 of 1860), S. 174.

Section 174, Penal Code, is one of the sections referred to in S. 195, Criminal P. C., and having regard to the provisions of S. 487 of the Code, therefore, an offence under S. 174 cannot be tried by the officer whose order is disobeyed.

Accused failed to appear in obedience to a lawful summons issued by a Magistrate, whereupon the Magistrate tried and convicted him under S. 174, Penal Code:

Held: that the proceeding was illegal and must be set aside. [P 320 C 2]

Judgment.—The accused in this case was convicted under S. 174, I. P. C., on a charge of non-attendance in the Court of Mr. W. Gurney in obedience to a lawful summons. The case was tried by Mr. Gurney himself and he convicted the accused and sentenced him to a fine of

Rs. 10. This proceeding was illegal, having regard to the provisions of S. 487, Criminal P. C. The case was one of those referred to in S. 195, Criminal P. C. and, therefore, could not be tried by the officer whose order was disobeyed. I accordingly set aside the conviction and sentence and direct that the fine, if paid, be refunded.

V.B./R.K. *Conviction set aside.*

A. I. R. 1918 Allahabad 320 (2)

PIGGOTT AND WALSH, JJ.

Manik Chand—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 669 of 1917, Decided on 10th November 1917, from order of First Class Magistrate, Bareilly, dated 31st May 1917.

U. P. Municipal Account Code, R. 60—Accused refusing to pay octroi duty as being excessive—Matter referred to Octroi Superintendent and duty assessed by him—Failure to pay duty within sixty days—Accused held guilty of breach of R. 60—U. P. Municipalities Act (1900)—U. P. General Clauses Act (1904), S. 24.

A consignment of cloth addressed to the accused arrived at the octroi barriers and he was asked to pay a certain amount as octroi duty, Accused considered the sum as excessive and the matter was referred to the Octroi Superintendent who assessed the duty at Rs. 1-0-9. The accused failed to pay the sum within sixty days.

Held: (1) that the accused was guilty of a breach of rule 60 of the U. P. Municipal Account Code, framed under the provisions of the U. P. Municipalities Act of 1900; (2) that although the U. P. Municipalities Act of 1900 had been repealed by the Act of 1916, the jurisdiction of the Court was saved by S. 24, U. P. General Clauses Act. [P 321 C 2]

P. N. Banerji—for Applicant.

R. Malcomson—for the Crown.

Piggott, J.—This is an application in revision against the conviction of one Manik Chand, a shopkeeper and cloth dealer of the city of Bareilly, on a prosecution instituted against him under the orders of the Municipal Board of that place. It would appear that on 19th February a consignment of cloth addressed to Manik Chand reached one of the octroi barriers on the boundary of the aforesaid Municipal area. The officer in charge demanded a larger sum by way of octroi duty than Manik Chand considered was properly leviable under the rules. The matter was referred to the Octroi Superintendent who assessed the duty at Rs. 1-0-9, and it is quite clear

that he had power to do this under the rules. The position then became this, that Manik Chand had a right of appeal within sixty days against the decision of the Octroi Superintendent, but that he could only exercise that right by first paying under protest the duty demanded and then appealing within seven days of the date of this payment. Practically the result is that he had 53 days within which to make up his mind whether he would pay or not and if he desired to pay under protest and to exercise his right of appeal, he could then do so. Manik Chand seems to have elected to fight the matter out with the Board. It seems that he presented a petition to the Chairman but as he did this without having paid under protest or otherwise the extra duty demanded, it could not be treated as a valid petition of appeal. On the expiry of the sixty days a prosecution was instituted by the issue of a summons from a Magistrate's Court and Manik Chand has been sentenced to a fine of Rs. 5 for breach of Rule 40 of Municipal Account Code, which lays down that under the circumstances above stated a person in the position of Manik Chand shall pay the duty as assessed by the Octroi Superintendent subject to the right of appeal already mentioned.

The substantial point taken in the petition before us is that Manik Chand, having left the goods in question in the possession of the Municipal authorities, should not be regarded as having committed any offence. This plea would be a valid answer if the case against Manik Chand were that he had introduced or attempted to introduce within octroi limits goods liable to the payment of octroi for which the octroi due had neither been paid nor tendered (vide S. 155 United Provinces Municipalities Act 2 of 1916). This, however, is not the question before us. What we have to determine is whether there has been a punishable breach of a rule validly made by the Local Government under powers lawfully exercisable by that Government. We felt some difficulty over the question as to whether the mandatory direction in R. 40, already referred to which directs that the person thinking himself aggrieved by the assessment made by the Octroi Superintendent shall pay the sum so assessed subject to a right of appeal, could be made the basis of a prosecution in the

absence of a clear specification of the period within which such payment must be made and the expiration of which without payment could be regarded as completing the offence. We think, however, upon an examination of the rules, that the necessary period is laid down by inference and that it is a period of 53 days from the date of the Octroi Superintendent's assessment.

It has been suggested before us in argument, although the point is not explicitly taken in the petition for revision that the rules of the Municipal Account Code under which this conviction has been affirmed are no longer in force, by reason of the repeal of the former Municipalities Act 1 of 1900 under which these rules were framed. We have been informed that the question of the revision of the Municipal Account Code is under consideration and it may well be that this rule, amongst others, would be the better for revision in the direction of greater clearness and definiteness. In the meantime, however no fresh rules have been issued under the powers exercisable by the Local Government by virtue of S. 299 of the present Act. On this point it would seem that the jurisdiction of the Court is saved by S. 24, Provincial General Clauses Act 1 of 1904. In a very similar case another Judge of this Court has treated the provisions of this Act as validating a prosecution for an offence punishable, if at all only under the Act of 1900, vide the case of *Amir Hasan Khan v. Emperor* (1). There is therefore authority for the view which we take of the operation of S. 24 above referred to. We are of opinion that this application fails and must be dismissed.

Walsh, J.—I agree. I have felt some doubt as to whether the old rules of 1900 have not ceased to have any operative effect, so far as they are inconsistent with S. 155 of the new Act, and of course care will have to be taken when making the new rules in dealing with this matter which is expressly provided for by S. 155 of the new Act, but I do not feel so clear about it that I ought to differ.

The offence charged is clearly the failure to pay. The case is very like the well known case reported in the English reports where a certain Alderman who was Chairman of the Watch Committee, and therefore in effect Chairman of the

1. (1917) 98 I O 736=18 Cr L J 352.

Tram Company was returning from a theatre in an overloaded tram and gave up his seat to a lady and in doing so dropped his ticket. When the Inspector came to collect the tickets and the Alderman was unable to produce his ticket, he was asked to pay his fare again or to leave the car. He refused to do either and was summoned for failing to pay his fare. The High Court held that it was impossible for the Inspector to hold an inquiry then and there and to arrive at a decisive result as to whether fare had already been paid once or not and that the fare ought to have been paid under protest and if it had been paid twice could be recovered from the Company, and the Alderman was held technically guilty. That is a reasonable result in this case, because after all it was the duty of the octroi official to collect the money, and if the payment made under protest, either with the object of presenting an appeal or where no appeal is preferred, turns out in fact to be in excess of the proper amount payable, there is an authority of this Court that it can be recovered in a suit against the Municipality. I agree therefore that this is not a case for interference in revision.

By the Court.—The application is dismissed.

V.B./R.K. *Application dismissed.*

A. I. R. 1918 Allahabad 322

WALSH, J.

Sital—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 546 of 1917, Decided on 28th July 1917, against order of Sess. Judge, Allahabad, D/- 8th June 1917.

(a) **Treasure Trove Act (1878), Ss. 20 and 21—Forbidding person who is not finder to give required notice is no offence.**

Forbidding a person, who is not the finder of a treasure and who has not been employed or instructed by the finder to give notice on his account to give the notice required by S. 4 is not an offence within the meaning of S. 21 of the Act. [P 322 C 2 ; P 323 C 1]

(b) **Criminal P.C. (1898), S. 236—Doubt as to what offence committed—Charge should be clearly formulated.**

In a case where there is some doubt as to what the offence really is that an accused is supposed to have committed, the charge should be clearly formulated. [P 323 C 1]

A. P. Dube—for Applicant.

R. Malcolmson—for the Crown.

Judgment.—This is a very curious case. As the result of the heavy flood in

the Ganges last year it appears that certain ancient coins said to be about 150 years old, were found on the bank of the Ganges. The evidence as to the circumstances under which they originally came to be found and whence they had originally come is extremely vague. I was inclined to think that they could not be described at all as treasure trove which must be something of value hidden in the soil or in anything affixed thereto. But it does appear with regard to these particular coins that there was clear evidence that they were treasure trove and I think the finding that they were treasure trove was right. Some of them at any rate were dug up from the soil in the month of February under or near an old "kuti" or at any rate adjacent to a temple and as many as fourteen were found at one spot and therefore the inference that they had been washed up by the river is negatived.

The fact also that similar coins had originally been discovered in the previous September when the water of the Ganges receded tends to show that the discovery of the particular coins was not the result of the flood at all but the efforts of industrious persons who went out in search of them, and therefore so far as the questions of treasure trove is concerned I agree with the Court below. I also agree, though it is not necessary to decide this point, that a usufructuary mortgagee such as the applicant is of the area in question is the owner within the meaning of the section. The question is whether the present applicant as such owner has committed an offence within the meaning of S. 21. He has been convicted of abetting the finder committing an offence by failing to give notice to the proper persons under S. 20. There is no doubt from the evidence that he discouraged everybody from either handing over the coins which they had in their possession or from doing their duty under the Act. But the only person whom he interfered with by forbidding to give notice was Ganga and he was not the finder. The Sessions Judge finds that he abetted the chaukidar, but although he may have been guilty of some offence under the general criminal law for interfering with the chaukidar in the performance of his duty the chaukidar was not the finder and had not been employed or instructed by the finder to give notice on his account; and therefore dissuading the chaukidar which the Sessions

Judge has convicted him of does not come within S. 21 or S. 20. The result is that there is no evidence of the offence of which the accused has been convicted, and the conviction and sentence must be quashed.

One has often occasion to say and I think it necessary to say again that it would be very much better specially where there is some doubt as to what the offence really is that an accused is supposed to have committed, that the charge should be clearly formulated. To say that a person has abetted under S. 21, an offence under S. 20, leaves it entirely at large what the form of abetment is, who the person may be whom he has abetted and what the offence is which the person has committed, whom he is supposed to have abetted. In this case there is no statement until the case reached the Sessions Judge as to whom he was supposed to have abetted and of what form the abetment was or of what offence the chaukidar committed which the applicant abetted.

Another matter of the same kind I notice which a trial Court should take care to avoid if possible is asking each one of the accused in the memorandum of examination, "Did you find any treasure trove coins?" That question was put to nearly all the accused. In a case like this it is a perfectly idle question because the person to whom the question is put does not know what a treasure trove coin is and the question assumes that the coins which had been in fact found and dealt with are treasure trove. That question as I have already pointed out, depends entirely upon whether they were hidden in the soil and the person in whose possession they may happen to be has come across them as treasure trove. Isolated coins picked up by a casual observer on the bank of a river can hardly be described as treasure trove at all.

V.B./R.K.

Conviction quashed.

A. I. R. 1918 Allahabad 323

RICHARDS, C. J. AND TUDBALL, J.

Chithru Singh and another—Defendants—Appellants.

v.

Bhagwant Singh—Plaintiff—Respondent.

Second Appeal No. 1047 of 1916, Decided on 1st May 1918, from decree of Dist. Judge, Azamgarh.

Pre-emption—Pre-emptor present at sale—Refusal to bid amounts to refusal to purchase—Suit for pre-emption is not maintainable.

Certain land under the management of the Court of Wards was sold by public auction. The sale was duly proclaimed and advertised. The plaintiff was present at the first attempt to sell, but made no bid. The highest bid being considered insufficient, the property was withdrawn and was put up for sale a second time, when it was actually sold. One year after the sale the plaintiff brought a suit for pre-emption:

Held: that the plaintiff's conduct at the sale amounted to a refusal to purchase and that he was not therefore entitled to maintain a suit for pre-emption. [P 323 C 2]

*M. L. Agarwala and N. P. Singh—*for Appellants.

*Baleshwari Prasad for Braj Nath Vyas—*for Respondent.

Judgment—This appeal arises out of a suit for pre-emption. The property is under the management of the Court of Wards. The sale was duly proclaimed and advertised and it has been found that the plaintiff was actually present at the first attempt to sell. He made no bid. Rs. 1,000 was the highest bid which was considered at the time insufficient and the property was withdrawn. The property was again advertised for sale and put up a second time, when the vendee purchased at Rs. 950. It is not known whether or not the plaintiff was present at the second sale. After the sale was completed, the plaintiff made not the smallest attempt to protest at the sale being made but on the contrary waited for 12 months, when he instituted the present suit. We are perfectly satisfied (and there is nothing inconsistent with the facts the lower appellate Court has found and what we have said), viz., that the plaintiff knew perfectly well that the property was being sold and that he had every opportunity to purchase the property, if he pleased. In fact he got the most complete invitation to do so and even made an offer. We allow the appeal, set aside the decree of the lower appellate Court and restore the decree of the Court of first instance with costs of this Court and of the lower appellate Court.

V.B./R.K.

Appeal allowed.

A. I. R. 1918 Allahabad 324 (1)

RICHARDS, C. J. AND BANERJI, J.

Dambar Singh — Decree-holder—Appellant.

v.

Mohammad Munwar Ali and another — Judgment-debtors—Respondents.

Execution First Appeal No. 155 of 1916, Decided on 10th November 1917, from order of Sub-Judge, Meerut, D/- 3rd May 1916.

Provincial Insolvency Act (3 of 1907), S. 34 Attachment of debtor's decree ceases after adjudication — Official Receiver can alone execute decree.

A judgment creditor cannot execute a decree of his insolvent judgment-debtor which he has attached in the execution of his own decree after the adjudication of his judgment-debtor as an insolvent, inasmuch as the insolvency vests all the property of the insolvent on the Official Assignee and in effect cancels the attachment and the latter alone can execute the decree unless he sells it to some third party. [P 324 C 1]

Pyare Lal Banerjee—for Appellant.*S. M. Sulaiman* for *Abdul Raoof*—for Respondents.

Judgment.—One Sri Kishun had obtained a certain decree. The appellant here obtained another decree against Sri Kishun and attached the decree belonging to Sri Kishun. Sri Kishun was declared an insolvent and his property vested in the Official Assignee. Notwithstanding the adjudication of Sri Kishun the appellant sought to put into execution the decree belonging to Sri Kishun, which he had attached in execution of his decree. The judgment-debtors objected that Dambar Singh was not competent to execute the decree. The Court below held that the objection had force and dismissed the application. We think the decision appealed from is correct. The effect of the attachment obtained by the appellant was not to vest in him any property. It gave him no doubt the right to execute the attached decree, and had it not been for the insolvency he would still have that right. The insolvency however vested all the property of the insolvent in the Official Assignee and in effect cancelled the attachment obtained by Dambar Singh. Once Sri Kishun was declared an insolvent, the Official Assignee was the only person who could execute the decree which Sri Kishun had obtained, unless the Official Assignee had, in realising the estate, sold the decree to some third party: see the decision of their Lordships

of the Privy Council in *Raghunath Das v. Sundar Das* (1).

In the third ground in the memorandum of appeal the appellant contends that the Court below has also dismissed his application to recover certain costs which were no part of the decree belonging to Sri Kishun but which were in fact awarded to him as costs of previous execution proceedings. We think that this objection may have force. If any costs were awarded to Dambar Singh personally against the judgment-debtors, those costs form no portion of the assets of Sri Kishun and accordingly never vested in the Official Assignee. Save as just mentioned we dismiss the appeal but in doing so expressly state that the dismissal of the appeal is not to prejudice the right of the appellant (if he has any) to recover costs which were personally awarded to him. We make no order as to costs of the appeal. The order of the Court below as to costs in that Court will stand.

V.B./R.K.

Appeal dismissed

1. (1912) 35 Mad. 622=9 I C 786.

A. I. R. 1918 Allahabad 324 (2)

RICHARDS, C. J. AND BANERJI, J.

Anandi Kunwar—Plaintiff—Appellant.

v.

Ram Niranjana Das and another—Defendants—Respondents.

Second Appeal No. 987 of 1916, Decided on 13th March 1918, from decree of Dist. Judge, Benares.

Civil P. C. (1908), O. 21, R. 63—Suit under—Value of suit for jurisdiction is value of decree sought to be executed and not value of property attached—Suits, Valuation.

The value for purposes of jurisdiction of a suit for a declaration that a certain property attached in execution of a decree is not liable to sale, is the value of the decree sought to be executed, and not the value of the property attached.

[325 C 1]

Narmadeshwar Upadhyaya and *Surendra Nath Sen*—for Appellant.*B. E. O'Connor* and *Haribans Sahai*—for Respondents.

Judgment.—This appeal arises out of a suit in which the plaintiff sought a declaration that certain property was not saleable in execution of a certain decree. It appears that the principal defendants had a decree against the plaintiff's husband. In execution of that decree they attached certain property, alleging it to be the property of their judgment-debtor. The decree was for in or about Rs. 2,000. The plaintiff in the present suit objected

to the attachment. The objection was overruled and the plaintiff had to bring the present suit. The Court of first instance dismissed her claim holding that the property was the property of the judgment-debtor and dismissed the plaintiff's suit. The plaintiff has now preferred this second appeal. The first and main objection urged is that the District Judge had no jurisdiction to hear the appeal because the value of the property was over Rs. 5,000. This objection does not come very well from the plaintiff, considering that it was she herself who preferred the appeal to the District Judge. If the argument held good, it would mean that the judgment of the Court of first instance had become final and the probabilities are that no Court would allow an appeal now to be presented from the judgment of the first Court. We think however that the value of the subject-matter of the suit and the appeal was below Rs. 5,000. What the plaintiff claimed was a declaration that the property was not saleable in execution of the decree, that is, for the realisation of the amount of the decree.

The defendants were only concerned to the extent of the amount due under their decree. They did not care whether the plaintiff could keep the property after their decree had been satisfied. This very point was decided in the case of *Khetra Pal v. Mumtaz Begam* (1). We have been referred by Mr. Upadhyaya to the case of *Radha Kunwar v. Reoti Singh* (2). This ruling it seems to us supports the view that we take in the present case. There it was held that though the mortgage decree, which was sought to be satisfied, was far above Rs. 10,000, the value of the property to the decree-holder and to the judgment-debtor was below Rs. 2,000, and their Lordships of the Privy Council held that this must be taken to be the value of the subject-matter of the appeal. We consider that the appeal lay to the District Judge. It was for that Court to decide questions of fact and we think that the findings arrived at conclude the present appeal. It is accordingly dismissed with costs.

V.B./R.K.

Appeal dismissed.

1. A I R 1916 P O 18=38 All 488=95 I O 939 (P. O.).

2. A I R 1915 All 436=31 I O 879=38 All 72.

A. I. R. 1918 Allahabad 325

TUDBALL AND ABDUL RAOOF, JJ.

Man Mohan Lal — Plaintiff—Appellant.

v.

Gopi Nath and others—Defendants—Respondents.

Second Appeal No. 935 of 1916, Decided on 3rd May 1918, from decree of Dist. Judge, Bareilly.

Execution sale—Rights of purchaser—Property transferred by auction-purchaser—Transferee deprived of possession—Refund of price by auction-purchaser—Suit by auction-purchaser to recover purchase-money from decree-holder is not maintainable.

Certain property was attached in execution of a decree. One B claimed the property but his objection was disallowed. He then brought a suit for declaration which was also dismissed. In appeal however he obtained a decree that the property attached belonged to him and that the judgment-debtors had no interest in it. In the meantime the property had been put to sale and had been purchased by the plaintiff who had transferred it to S. B sued S and obtained possession of the property, whereupon the plaintiff refunded to S the price paid by the latter. The plaintiff then sued to recover the sale price paid by him from the decree-holder and other creditors of the judgment-debtors among whom it had been distributed:

Held: that the suit was not maintainable.

[P 326 O 1]

Gulzari Lal—for Appellant.

S. M. Sulaiman—for Respondents.

Judgment.—This and the connected Appeal No. 936 of 1916 arise out of the same suit. The facts are simple. Ganesha Prasad and others obtained a decree against Asharfi Lal and others. They had prior to the suit obtained attachment of certain property. One Badri Prasad came forward and claimed the property as his own and his objection was disallowed. He thereupon brought a suit for a declaration that the property was his and was not attachable and saleable in execution of the decree. His suit was dismissed by the first Court on 1st March 1909. The property was then put to sale and was purchased by Sita Ram on 1st October 1909. Badri Prasad however appealed and on appeal he succeeded and the Court held that the property was his and that the judgment-debtors had no interest therein. This decree was passed on 3rd June 1910. In the meantime Sita Ram had transferred the property to Shiam Sundar Lal and the latter was in possession.

Badri Prasad sued him for possession and obtained a decree on 31st July 1912

and in due course he ousted him. Sita Ram then refunded to Shiam Sundar Lal what the latter had paid to him for the property. He has now assigned his rights, whatever they may be, to the present plaintiff-appellant who appears to be a speculator, and he has sued to recover the sale price paid by Sita Ram which, we may mention, had been distributed among a large body of creditors in addition to the decree-holders in the original suit against Asharfi Lal. The Court below has dismissed the suit on the ground that it was not maintainable. The case is on all fours with the case of *Nannu Lal v. Bhagwan Das* (1). We think that the case being governed by that ruling this appeal must fail and it is therefore dismissed with costs.

V.B./R.K. *Appeal dismissed.*

1. (1917) 39 All 114=37 I C 9.

* A. I. R. 1918 Allahabad 326

BANERJI, J.

Badri Prasad—Accused—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 680 of 1917, Decided on 9th September 1917, from order of Sess. Judge, Banda, D/- 2nd August 1917.

* Penal Code (1860), S. 192—Antedating receipt of sale when sale in fact took place on previous date is no offence.

Accused was a clerk whose duty was to register sales of cattle at a market. Two persons brought some cattle in the market on 21st March but omitted to obtain receipts for them, and on leaving the market they were asked by a Sub-Inspector of Police to produce receipts for the cattle. On 27th March they produced the receipts which bore date 21st March but were in fact prepared by the accused on 27th:

Held: that the accused was not guilty of the offence of fabricating false evidence inasmuch as the receipts, so far from causing the Sub-Inspector to entertain an erroneous opinion touching a point material to the result of the inquiry he was making, might have caused him to form a correct opinion. [P 326 C 2; P 327 C 1]

P. L. Banerji—for Applicant.

R. Malcomson—for the Crown.

Judgment.—The applicant *Badri Prasad* has been convicted of fabricating false evidence as defined in S. 192, I. P. C., and has been sentenced under S. 193 of that Code to three months' rigorous imprisonment. *Badri Prasad* was a clerk employed by the *Naraini* estate, which is in charge of the Court of Wards, and one of his duties was to register sales of cattle at the *Naraini* market. On 21st

March 1917 two persons, *Riyayat* and *Arman*, were carrying away twenty-six head of cattle. While they were passing *Bissinda* Police Station, the Sub-Inspector stopped them and wanted them to produce the receipts which they had obtained as to the registration of the sale of the cattle. They produced nineteen receipts but they had none as regards the remaining seven head of cattle. On 27th of that month they produced seven receipts bearing date 21st March 1917. These receipts had in fact been prepared by the accused on 27th but they were dated, as I have said above, 21st March. It has been proved that the seven head of cattle were in fact purchased by *Riyayat* and *Arman* on 21st March at the market, but for some reason which does not appear, probably through oversight, receipts were not granted in regard to them. The accused was sent up for trial for an offence under S. 218, I. P. C. But as he was not a public servant he could not be convicted under this section. The learned Magistrate however convicted him under S. 193, he being of opinion that in preparing the seven receipts *Badri Prasad* had fabricated false evidence. The offence of fabricating false evidence is defined in S. 192. The ingredients of the offence are that circumstances should be caused to exist, or a false entry should be made in any book or record or any document should be made containing a false statement that such circumstances, false entry or false document should be made with the intention that it may appear in evidence in a proceeding taken by law before a public servant, and so appearing in evidence may cause such public servant to entertain an erroneous opinion touching any point material to the result of the proceeding. The proceeding, which the Sub-Inspector who is a public servant was holding was one for the purpose of ascertaining whether the cattle had been purchased at the market by the two men who were carrying them or whether they were stolen property. The receipts which were granted by the accused to the purchasers of the cattle could not possibly cause the Sub-Inspector to entertain an erroneous opinion touching a point material to the result of the inquiry he was making. He was satisfying himself whether the cattle were stolen property and these receipts, so far from

causing him to entertain an erroneous opinion as to whether the cattle had been sold or not might have caused him to form a correct opinion on the point. One of the principal ingredients of the offence of fabricating false evidence was therefore, wanting in this case. This being so, the offence of fabricating false evidence was not committed by the accused and he could not be criminally punished under S. 193, I P. C. His conduct in granting receipts subsequently to the date of the actual sale or in making alterations in his register was no doubt reprehensible, but it did not constitute a criminal offence for which he could be convicted. I accordingly allow the application, set aside the conviction and the sentence and acquit Badri Prasad of the offence of which he was convicted. The bail-bond furnished by him is cancelled.

V.B./R.K. *Application allowed.*

A. I. R. 1918 Allahabad 327

TUDBALL AND ABDUL RAOOF, JJ.

Ram Chandra Naik Kalia — Plaintiff — Appellant.

v.

Raghunath Saran Singh Deo and another — Defendants — Respondents.

First Appeal No. 301 of 1915, Decided on 13th May 1918, from decree of Sub-Judge, Mirzapur.

(a) Civil P.C. (5 of 1908), S. 73 — Suit for refund of money improperly awarded, before actual distribution is not maintainable.

A suit by a decree-holder to recover the sums improperly awarded to other decree-holders of the same judgment-debtor under S. 73, before the money has been actually paid to them, is premature and cannot therefore be maintained.

[P 327 C 1]

(b) Civil P. C. (5 of 1908), S. 73 — Mode of distribution illustrated.

Plaintiff and defendants obtained decrees against the estate of one F. In execution of the decree obtained by defendant 1 plaintiff applied rateable distribution. It was found that the judgment-debtors in the plaintiff's decree represented only three-fourths of the estate of F.

Held: that only three-fourths of the amount recovered in execution of defendant 1's decree was liable to rateable distribution. [P 327 C 2]

Sital Prasad Ghosh and *K. N. Laghate* — for Appellant.

B. E. O'Connor, *Tej Bahadur Sapru* and *Lalit Mohan Banerji* — for Respondents.

Judgment.—This is a plaintiff's appeal. He and the two defendants respondents are three decree-holders. One Farzand Ali died leaving a certain number

of heirs of whom Mt. Najm-un-nissa was one, she being his widow. She brought a suit as against her coheirs to recover Rs. 97,500 due to her as dower. The other two defendants-respondents brought suits against all the heirs of Farzand Ali including Najm-un-nissa and obtained decrees as against them for moneys due from Farzand Ali. In all three cases the sums found due were recoverable from the assets of Farzand Ali which had come to the judgment-debtors by inheritance. A certain property was attached and sold in execution of the decree obtained by defendant 1, and the plaintiff applied for rateable distribution, so also did defendant 2. The plaintiff, we may state here, is the transferee of the decree of Mt. Najm-un-nissa. Rateable distribution was allowed only in respect to $\frac{3}{4}$ ths of the sum recovered, inasmuch as the judgment-debtors in the plaintiff's decree represented only $\frac{3}{4}$ ths of the estate.

Before the money was paid out to the other two decree-holders, plaintiff brought the present suit actually to recover the sums which he considered had been improperly awarded to the other two defendants. The Court below dismissed his suit, holding, in the first place, that it was premature having been brought before the money had actually been paid, and secondly, on the merits holding that proper rateable distribution had been made. It based its decision on the Full Bench decision in *Gonesh Das Bagria v. Shiva Lakshman Bhakat* (1). That is a decision which has been followed in this Court in the case of *Gatti Lal v. Bir Bahadur Sahai* (2). The plaintiff comes here on appeal and challenges the lower Court's finding. It is quite clear as a matter of actual fact that the suit was premature, inasmuch as it was brought before the money had been paid but it is unnecessary to decide the appeal on a technical point when on the merits it must equally fail. The two decisions mentioned above apply to the case, and it is quite clear that the Court below has rightly applied the principle laid down therein. The plaintiffs judgment-debtors only represented $\frac{3}{4}$ ths of the estate and clearly only $\frac{3}{4}$ ths of the amount recovered was liable to be distributed rateably. The figures of the distribution have not been challenged.

1. (1903) 30 Cal 583 (FB).

2. (1904) 27 All 158.

In our opinion there is no force in the appeal. We therefore dismiss it with costs.

V.B./R.K.

Appeal dismissed.

A. I. R. 1918 Allahabad 328

TUDBALL AND ABDUL RAOOF, JJ.

Nandlal Singh—Plaintiff—Appellant.

v.

Beni Madho Singh and others—Defendants—Respondents.

Second Appeal No. 1246 of 1916, Decided on 28th June 1918, from a decree of Sub-Judge, Cawnpore, D/ 9th May 1916.

Contract Act (9 of 1872), S. 69—Independent trespasser trespassing by virtue of separate deeds are not liable to contribute towards cost of suit for ejectment by owner against them jointly when one has not contested the claim.

Plaintiff and defendant each obtained a half share in certain property under separate deeds of gift. A third person brought a suit for recovery of a certain share in the property, in which both were impleaded as defendants. Plaintiff contested the suit but the defendant did not, and ultimately the suit was decreed against both with costs. The decree-holder recovered the full amount of the costs from the plaintiff, who thereupon brought a suit for contribution against the defendant, claiming half the costs which he had been compelled to pay:

Held: that the plaintiff and the defendant were independent trespassers who derived their titles under separate deeds of gift and who were separately liable for the trespass committed by each, and that therefore the defendant was not liable to contribute anything towards the amount which had been recovered from the plaintiff. [P 329 C 1]

Tej Bahadur Sapru, Shamnath Mushran and Kailash Nath Katju—for Appellant.

Baldeo Ram Dave, Braj Nath Vyas and Nawal Kishore—for Respondents.

Judgment. — The plaintiff appellant in this suit was a person who under a deed of gift executed by one Jagat Singh obtained a half share in certain property. The respondent Ram Lal Singh is a person who received a half share in the same property by an entirely separate deed of gift from the same Jagat Singh. Beni Madho Singh and Zalim are certain persons claiming to be the lawful owners of a certain share in that property. They brought a suit to recover their shares and they impleaded both Ram Lal Singh and Nand Lal Singh in the suit. Ram Lal Singh did not defend the suit, but Nand Lal Singh did and in the course of his pleadings he stated that Ram Lal Singh was at the bottom of the suit and that he had instigated the plaintiff to sue.

Part of the claim was decreed and part of the claim was dismissed. The plaintiffs appealed in respect to so much of their claim as was disallowed. Nand Lal Singh appealed in respect to so much of the claim as had been decreed against him. The plaintiffs' appeal was allowed, and Nand Lal Singh's appeal was dismissed. Ram Lal Singh was a respondent to both the appeals. He contested neither. In the execution department, Ram Lal Singh pleaded that no portion of the share decreed to the plaintiffs should be taken from him but that it should all be taken from Nand Lal Singh. Nand Lal Singh opposed him. The Court held that each of them had in his hands half of the share decreed. The appellate decree, which is the decree of the Court in the plaintiff's appeal, shows clearly that this Court held that each defendant was separately liable in respect of the property which was in his hands. The order for costs was a joint one. The plaintiffs in the former suit have recovered the whole of their costs from Nand Lal Singh. He has now brought the present suit for contribution, claiming half from the defendant Ram Lal Singh.

This is clearly not a case of joint tortfeasors. Ram Lal Singh derived his title to the property which was in his hands by an entirely separate deed from Jagat Singh and Nand Lal Singh derived his title, such as it was, by a separate deed of gift. The two defendants were not at one in defending the suit. They were as a matter of fact opposed to each other. Para. 15 of the written statement of Nand Lal Singh shows this clearly. Ram Lal Singh in no way contested the suit, whereas Nand Lal Singh did and it is quite clear that the extracosts that were incurred in that suit were due to the action of the present plaintiff Nand Lal Singh alone. The case is very much like that of *Fakire v. Tasadduq Husain* (1). In this case there was no contract between the present parties. Each was in separate possession of property and there was nothing joint. Each was separately liable for the trespass that he had committed. Each trespass was committed separately, and each defendant's liability for mesne profits was entirely separate. The only thing common between them was that they were arrayed as defendants to the suit. We cannot find any equity in

1. (1897) 19 All 462.

the present case that will enable us to hold that the respondent Ram Lal Singh is in any way liable to the plaintiff for a share of the costs that were recovered from him. The appeal is dismissed with costs to Ram Lal Singh. It is to be noted that the action of the plaintiff is directed solely against Ram Lal Singh and not against the other respondents. This is clearly admitted before us in open Court.

V.B./R.K.

Appeal dismissed.

A. I. R. 1918 Allahabad 329

TUDBALL, J.

Ram Sahai—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 888 of 1917, Decided on 15th December 1917, from order of Dist. Magistrate, Farrukhabad, D/11th October 1917.

Criminal P. C. (1898), S. 195—Offence under Penal Code S. 471 committed before Collector in appeal—District Magistrate has no jurisdiction to take cognizance of offence—Penal Code (1860), S. 471

A District Magistrate qua District Magistrate has no jurisdiction to take cognizance of an offence under S. 471, I. P. C. committed by a party to a proceeding in the Revenue Court of the Collector in respect of a document given in evidence in the course of an appeal. [P 329 C 2]

S. C. Mukerji—for Applicant.

R. Malcomson—for the Crown.

Judgment.—The facts of this case have one peculiarity about them. Briefly stated they are as follows: There was a lambar-dari case pending in appeal in the Court of the Collector of Farrukhabad. The present applicant Ram Sahai had been appointed by a Subordinate Court as lam-bardar and the opposite party had appealed against the order. The opposite party pleaded that Ram Sahai was in debt, that his estate was burdened and that he should not be appointed. He pleaded that he had paid up a considerable part of the debt and in order to establish it he produced a receipt for Rs. 450, dated 20th December 1911 and bearing on it a one anna postage stamp which bore the effigy of King George V. The Collector came to the conclusion that this receipt was not genuine, on the ground that the stamp which was affixed to it was not obtainable in the district on 20th December 1911. Ram Sahai explained that the stamp had been affixed to the receipt a year after the execution of the document itself. The Collector came to the conclusion that Ram Sahai should not be ap-

pointed and he passed orders accordingly on 5th September 1917. Under his order deciding the appeal he wrote the following order:

"I propose to make further enquiry into the matter of the receipt as District Magistrate. I order that Kashi Ram, Inderjit and Tansukh be summoned to my Court on 25th September and direct that Ram Sahai execute a bond in Rs. 100 for his appearance on that date."

A separate record was commenced in the forefront of which there is a vernacular translation of this order, in which it is distinctly set out that Mr. Alexander in his capacity as District Magistrate was taking up this matter. He passed orders on 11th October as follows:

"Ram Sahai appears to be guilty of an offence under S. 471, I. P. C. and I send this record to Mr. Mahadeo Prasad for necessary action together with Ram Sahai."

It is against this order that the present application in revision has been filed. Now it is quite clear under S. 195, Cl. 1 (c), Criminal P. C. that no Court could take cognizance of the offence under S. 471, I. P. C. except with the previous sanction or on complaint of the Collector of Farrukhabad. The District Magistrate of Farrukhabad qua District Magistrate had no jurisdiction to take cognizance of the offence, because the offence had been committed by a party to a proceeding in the Revenue Court of the Collector in respect of the document which was given in evidence in the course of the appeal. Mr. Alexander in his capacity as Collector and Presiding Officer of the Revenue Court of appeal has made no complaint and has given no sanction. Therefore no criminal Court could take cognizance of the offence in the present case. The order of the District Magistrate in the present case is ultra vires and must be set aside. I would point out that if the Collector of the District had taken action under S. 476, Criminal P. C., and had made a complaint, then this Court would have had no jurisdiction to interfere with his order. At first I was under the impression that Mr. Alexander had acted in his capacity as the Presiding Officer of a Revenue Court of appeal, but I am faced with the clear statement in his order that he is acting in his capacity as a District Magistrate and not as a Collector. I therefore allow this application. I set aside the order of the District Magistrate. It will be open to the Collector of the District to take any action which

he may deem necessary in the matter according to law.

V.B./R.K. *Application allowed.*

A. I. R. 1918 Allahabad 330

RICHARDS, C. J. AND BANERJI, J.

Ghulam Mohiuddin Khan and another
—Decree-holders—Appellants.

v.

Damber Singh — Objector — Respondent.

Execution First Appeal No. 281 of 1917, Decided on 7th January 1918, from decree of Addl. Sub-Judge, Aligarh, D/- 12th May 1917.

Limitation Act (9 of 1908), Art. 182—Decree against several defendants—Appeal by two dismissed with costs—Application for execution of appellate decree for costs was held barred by limitation.

One *S* obtained a decree jointly against *D*, *K* and several others. *D* and *K* appealed to the High Court and their appeal was dismissed with costs against them. In execution of a decree which *D* held against *S* he attached the decree obtained by *S* in the first Court and by several executions realised the whole amount due under it from the judgment-debtors other than *K* and himself. *S* became an insolvent and *G* purchased his assets including the decrees obtained by *S*. *G* then sought to execute the decrees :

Held : (1) that the decree obtained by *S* in the first Court having been fully executed by *D* *G* could not recover anything under it ; (2) that no previous application having been made to execute the High Court's decree for costs against *D* and *K*, *G*'s application was barred by limitation. [P 330 C 2]

Panna Lal—for Appellants.

Peary Lal Banerji—for Respondent.

Judgment.—The facts of this case are somewhat complicated but they can be shortly stated. One Sri Kishen Das obtained a decree. The decree was against one Damber Singh, Karan Singh and certain other persons. The decree awarded possession of certain property and costs against all the judgment-debtors jointly. Karan Singh and Damber Singh alone appealed to the High Court, which dismissed the appeal with costs against Damber Singh and Karan Singh. This happened on 1st December 1904. Damber Singh had a decree against Sri Kishen Das and he attached either the first Court's decree, or both the first Court's decree and the decree made by the High Court (it is not quite clear which) in execution of his decree against Sri Kishen Das. From time to time Damber Singh sought execution against all the judgment-debtors other than himself and Karan Singh. From time to time he

realized money as the result of these applications for execution and eventually it was held that he had realized the amount awarded by the first Court's decree. No mention appears ever to have been made specifically of the decree of the High Court, and it would almost seem as if it was the first Court's decree, and not the High Court's decree, which was being executed by Damber Singh. So far as the High Court's decree is concerned, the last application for execution previous to the present one was in the year 1907. Sri Kishen Das eventually became insolvent and the present applicants were purchasers at public auction of the assets of Sri Kishen Das including the decree or decrees to which we have referred above.

The present applicant is therefore entitled (provided he is within time) to execute the decrees which Sri Kishen Das obtained, and the present application was against Damber Singh for the alleged balance still due upon foot of the first Court's decree and the High Court's decree. It seems to us quite clear that so far as the first Court's decree is concerned the full amount was already realized by Damber Singh before Sri Kishen Das became insolvent. It is argued that the applications which were made from time to time by Damber Singh, the last of which was admittedly within three years of the present application, saved limitation and entitled the present owner of the decree to apply for execution. We do not think that this can be so in the present case, because the money which it is now sought to realise is really the money due on foot of the High Court's decree, and that decree was against Damber Singh and Karan Singh only. No previous applications since the year 1907 were made either against Damber Singh or Karan Singh. This being so, the order of the Court below was correct and must be confirmed. We dismiss the appeal with costs including in this court-fees on the higher scale.

V.B./R.K.

Appeal dismissed.

A. I. R. 1918 Allahabad 331

RICHARDS, C. J. AND BANERJI, J.

Champat Singh—Defendant—Appellant.

v,

Mahabir Prasad and others—Plaintiffs—Respondents.

First Appeal No. 84 of 1917, Decided on 30th November 1917, from order of Sub Judge, Meerut, D/- 15th March 1917.

(a) Civil P. C. (1908), O. 5, Rr. 17 and 19—Summons fixed to outer door of defendant—Defendant is not duly served until order under R. 19 is made by Court.

Where a summons is affixed to the outer door of a defendant under R. 17, O. 5, he cannot be said to be "duly served" until an order under R. 19 is made by the Court declaring that the summons has been duly served; and such order ought to be obtained as soon as reasonably possible after the return is made by the serving officer. [P 331 C 2; P 332 C 1]

(b) Civil-P. C. (1908), O. 9, R. 13—Ex parte decree against defendant—Defendant not "Duly served"—Defendant is entitled to have decree set aside.

Where an ex parte decree is passed against a defendant, then unless he was "duly served" he is entitled as of right, under R. 13, O. 9, to have the decree set aside. [P 331 C 2]

M. L. Agarwala—for Appellant.*Surendra Nath Sen*—for Respondents.

Richards, C. J.—This appeal arises under the following circumstances. The suit was instituted in the year 1915 and was a suit to realize the amount of a mortgage. One of the defendants was Champat Singh for himself and as guardian for certain minors. The 17th September was fixed to settle issues. On 13th August 1915 the process-server went to the house of Champat Singh and found him not at home. He was told that he had gone to bathe. This service was not sufficient and a fresh date, namely, 27th November, was fixed. On 28th September the process-server again went and learnt that Champat Singh was not in the house, that he had gone to another village and was expected back in a couple of days. The process-server then affixed the process to the door of Champat Singh's house. No order seems to have been obtained by the plaintiff from the Court as to whether or not this service was to be declared good. The case was called on 27th November, Champat Singh and the minors were absent and the Court directed that the case should be heard ex parte against them, and on 11th January 1916 an ex parte decree was passed. Thereupon Champat Singh applied to set aside the decree on the ground that he had

not been "duly served." The Court below states that the applicant had not shown that he had no knowledge of the suit, that the inmates of the applicant's house were present when the summonses were posted on the house on 30th August 1915 and 2nd September 1915. The learned Judge goes on to say that he does not believe that the applicant had no knowledge of the suit and the date fixed. O. 9, R. 13, is as follows:

"In any case in which a decree is passed ex parte against a defendant, he may apply to the Court by which the decree was passed for an order to set it aside, and if he satisfies the Court that the summons was not duly served. . . . the Court shall make an order setting aside the decree as against him."

It thus appears that unless the defendant has been "duly served," he is entitled as of right to have the ex parte decree set aside. O. 5 deals with the mode of service. Prima facie the service must be personal service by a delivering or tendering a copy as mentioned in R. 10. R. 17 provides, amongst other things, that where the serving officer, after using all due and reasonable diligence cannot find the defendant and there is no agent empowered to receive service on his behalf nor any other person on whom service can be made, the serving officer shall affix a copy of the summons on the outer door or some other conspicuous part of the house in which the defendant ordinarily resides, or carries on business, or personally works for gain, and shall then return the original to the Court from which it was issued, with a report endorsed thereon, or annexed thereto, stating that he has so affixed the copy, the circumstances under which he did so and the name and address of the person, if any by whom the house was identified, and in whose presence the copy was affixed. R. 19 provides that.

"Where a summons is returned under R. 17, the Court shall, if the return under that rule has not been verified by the affidavit of the serving officer, and may, if it has been so verified examining the serving officer upon oath, or cause him to be so examined by another Court, touching his proceedings, and may make such further inquiry in the matter as it thinks fit, and shall either declare that the summons has been duly served or order such service as it thinks fit."

In my opinion the defendant under circumstances like the present could not be said to have been "duly served", until an order under R. 19 had been made by the Court declaring that the summons had been "duly served," and in my opi-

nion this is an order which ought to be obtained as soon as reasonably possible after the return is made by the serving officer. It is obvious that it is most inconvenient to postpone making the order adjudicating on the sufficiency of the service until the day of hearing. The plaintiff may have had all the expense of bringing his witnesses and paying his pleader only to find that the case cannot go on and the Court may have a case in its list for hearing which cannot be proceeded with. In the present case a suit which was commenced in 1915 will have to be heard over again. It is for the plaintiff to bring his case properly into Court. Under the circumstances of the present case I think that Champat Singh was entitled to have the ex parte decree set aside. I would allow the appeal.

Banerji, J.—I also would allow the appeal. The Court was bound to set aside the ex parte decree if the summons to the defendant was not duly served. O. 5, R. 17, prescribes the mode in which service may be effected by fixing a summons to the outer door of the house of the defendant. In the present case the process-server reported that the defendant was not at his house but had gone to some other village, and on that ground he fixed the summons to the outer door of the house. This was not service made with due diligence and therefore it was not due service within the meaning of the Code. This was so held in the case of *Sakina v. Gouri Sahai* (1). It is clear therefore that in the present case service was not duly made as directed by the Code, and the Court below ought to have set aside the ex parte decree. It was not sufficient to find, as the Court below has done, that the defendant had knowledge of the suit. What the Court had to decide was whether service had been duly made, and this point the Court did not decide at all. Upon an examination of the record it appears that service was not duly made. On this ground the appellant is entitled to have the ex parte decree set aside.

By the Court.—The order of the Court is that the appeal be allowed, the ex parte decree set aside and we direct that the case be restored to its original number and heard according to law. We make no orders as to costs.

V.B./R.K. *Appeal allowed*

A. I. R. 1918 Allahabad 332

BANERJI, J.

Jagrup Shukul—Petitioner.

v.

Emperor—Opposite Party.

Civil Revn. No. 103 of 1917, Decided on 7th August 1917, from order of Sess. and Sub Judge, Jaunpur, D/- 2nd April 1917.

(a) Criminal P. C. (1898), S. 195—Superior Court—Munsiff is subordinate to Subordinate Judge within S. 195.

A Munsif is subordinate to a Subordinate Judge within the meaning of S. 195, if appeals from the Court of the former are preferred to the Court of the latter and "ordinarily lie" to his Court.

[P 333 C 1, 2]

(b) Criminal P. C. (1898), S. 195 (6)—Superior Court can take additional evidence.

In considering an application under S. 195 (6), Criminal P. C., a superior Court is competent to take and consider additional evidence for the purpose of satisfying itself whether sanction should or should not be granted. [P 333 C 2]

C. Ross Alston and *E. A. Howard*—for Petitioner.

G. P. Boys—for the Crown.

Judgment.—This application for revision was made under the following circumstances. A suit was filed in the Court of the Munsif of Jaunpur which was dismissed on 19th November 1914. An application was made to the Munsif of Jaunpur by the Government Pleader for sanction to prosecute the applicant under various sections of the Indian Penal Code, these being some of the sections mentioned in S. 195, Criminal P. C. The application purported to be one under S. 195, para. 1, Cl. (b), Criminal P. C. It was not an application under S. 476, as is erroneously stated in the order of the learned Munsif. The matter was taken up by the successor-in-office of the Munsif who had dismissed the suit. He took some additional evidence and came to the conclusion that there was not sufficient reason for sanctioning the prosecution of the present applicant, and he accordingly rejected the application. Thereupon a petition was presented in the Court of the Sessions and Subordinate Judge of Jaunpur, purporting to be an application under S. 195, para. (6), Criminal P. C. Mention was made in the application of the fact that the Munsif had refused sanction and the prayer was that sanction might be granted for the prosecution of the present applicant. I may mention that the officer called Sessions and Subordinate Judge of Jaunpur is Subordinate Judge of Jaunpur as regards civil matters

and Additional Sessions Judge as regards criminal cases. He took some further evidence and came to the conclusion that there was a prima facie case against the present applicant and accordingly granted the sanction asked for. It is this order of which revision is sought, and the main arguments upon which the application for revision is founded are that the Court below had no jurisdiction to grant the sanction asked for and that on the merits its order was not a proper one.

It is clear from the provisions of S. 195, Criminal P. C., that an original application for sanction may be made under Cl. (b), sub-S. (1) of that section either to the Court in which the proceedings in connexion with which the alleged offence is said to have been committed were held, or to some other Court to which that Court is subordinate. Under para. (6) any sanction given or refused may be revoked or granted by any authority to which the authority giving or refusing sanction is subordinate. If therefore the Munsif of Jaunpur was subordinate to the Subordinate Judge of Jaunpur, within the meaning of S. 195, Criminal P. C., an original application for sanction could be made to that officer, or that officer could be moved to grant the sanction which had been refused by the Munsif. It is therefore immaterial whether the application made to the Sessions and Subordinate Judge of Jaunpur was an original application under Cl. (b), para. (1) or an application under para. (6), S. 195. The real point for consideration is whether the Munsif of Jaunpur is to be deemed to be subordinate to the Subordinate Judge. Para. (7) of the section provides that for the purposes of the section every Court shall be deemed to be subordinate to the Court to which appeals from the former Court ordinarily lie.

As I have stated above, the position of the Subordinate Judge of Jaunpur is somewhat different from the position of ordinary Subordinate Judges, he is Additional Sessions Judge and he is Subordinate Judge for civil cases. Under orders issued by the High Court under S. 21 (4), Bengal, Agra and Assam Civil Courts Act, 1887 (vide Notification No. 1703/15—14, dated 25th April 1913) appeals from the Court of the Munsif of Jaunpur are preferred to his Court and "ordinarily lie" to his Court. Therefore the Subordinate Judge must be deemed to be the

authority to which the Munsif of Jaunpur is subordinate within the meaning of S. 195 and he was competent to entertain the application made to him, whether that application be regarded as one under para. (6) or as an original application under Cl. (b), para. (1). As to the merits of the case, the Subordinate Judge was, I think, competent to take and consider additional evidence for the purpose of satisfying himself whether sanction should or should not be granted. This is the view which was taken by a learned Judge of this Court in *Rahmatullah v. Emperor* (1). The learned Judge has not, it is true, set forth at length the reasons for the conclusion at which he arrived but having regard to the additional evidence, which was produced before the Munsif and also before the Subordinate Judge, it cannot be said that there was no prima facie case against the applicant. I am therefore of opinion that the present application is without force and I accordingly reject it. The order staying proceedings is discharged and it is directed that the record be sent back to the Court below.

V.B./R.K. *Application rejected.*

1. (1916) 32 I C 157=17 Cr L J 29.

A. I. R. 1918 Allahabad 333

BANERJI AND ABDUL RAOOF, JJ.

Hingo Singh and others—Defendants—Appellants.

v.

Jhuri Singh and others—Plaintiffs—Respondents.

First Appeal No. 113 of 1917, Decided on 30th April 1918, from order of Sub-Judge, Jaunpur.

Civil P. C. (1908), O. 9, Rr. 3 and 6 and O. 17, Rr. 2 and 3—Suit fixed for evidence—Defendants absent—One plaintiff who was also agent of others present but not adducing evidence—Suit dismissed for "want of prosecution"—Application for restoration dismissed—Separate suit was barred under O. 17, R 3—"Want of prosecution" meant in absence of evidence.

On a date fixed for hearing and production of evidence by the parties in a case, the defendants did not appear. One of the plaintiffs, who was also general attorney of the other plaintiffs, was present but he adduced no evidence. Thereupon the Court dismissed the suit for "want of prosecution." The plaintiffs applied to have the dismissal set aside, but their application was refused on the ground that their remedy was a separate suit. Thereupon the plaintiffs brought another suit for the same relief:

Held: (1) that inasmuch as all the plaintiffs were present through their general attorney, the

Court must be deemed to have acted under O. 17, R. 3, and to have dismissed the suit on the merits and not under O. 9, R. 3, and that therefore a second suit on the same cause of action was not maintainable; [P 335 C 1]

(2) that the words "want of prosecution" could only be understood as meaning that the plaintiffs did nothing to support their claim, i. e., that there was no evidence on the record which established their claim. [P 334 C 2]

S. M. Sulaiman—for Appellants.

M. L. Agarwala—for Respondents.

Judgment.—This is a somewhat unfortunate case. The facts which have given rise to it are as follows: The plaintiffs, who are six in number, brought a suit for the same relief which they have claimed in the present suit. That case was taken up for hearing and one of the plaintiffs was examined. The parties then informed the Court that they would abide by the deposition of a particular person. A date was fixed and on that date the person named appeared but refused to make any statement. Thereupon the case was postponed and 15th September 1914 was fixed for hearing and the parties were ordered to produce their evidence on that date. On 15th September, 1914, when the case was called on for hearing, the defendants or their pleader did not appear. The plaintiffs' pleader also did not appear. One of the plaintiffs Jhuri Singh was present but he did not "prosecute the suit," by which we understand the trial Court to mean that he adduced no evidence. Thereupon the Court made an order dismissing the suit "for want of prosecution" (ba-adam-pairawi). The plaintiffs applied to have this dismissal set aside but their application was refused on the ground that their remedy was a separate suit.

They thereupon instituted the present suit for the same reliefs. The Court of first instance dismissed it on the ground that the suit was not maintainable in view of the dismissal of the former suit. It held that the dismissal must be deemed to be a dismissal on the merits under O. 17, R. 3, Civil P. C., and therefore a subsequent suit could not be maintained. This decision of the Court of first instance was reversed by the lower appellate Court, which was of opinion that O. 17, R. 2, Civil P. C., was applicable to the case and that the suit was maintainable. That Court accordingly remanded the case to the Court of first instance. From this order of remand the present appeal has been filed. The question we

have to consider is, whether under the circumstances mentioned above, a second suit is maintainable. It is clear that on the date which was fixed for the hearing of the former suit, namely, on 15th September 1914, what the Court had to do, when it took up the case, was to ascertain whether the parties were present and which of them. After this the Court had to take action under the provisions of O. 9. If neither party was present it had to dismiss the suit under R. 3 of that Order. In that case the remedy of the plaintiffs would be either to apply to have the suit restored or to bring a fresh suit on the same cause of action, if not barred by limitation. If the plaintiffs were present and the defendants were absent, the Court had to proceed under R. 6 and hear the case *ex parte*. If the plaintiffs were absent and the defendants were present, it had to proceed under R. 8 and decide the case accordingly.

In the present case one of the plaintiffs Jhuri Singh was, as stated above, present and this is also stated in the judgment of the Court which heard the first suit. It has been found in this suit and the finding was never impugned, that he was the general attorney of all the other plaintiffs. Therefore, we must take it that all the plaintiffs were present before the Court, through Jhuri Singh, who appeared for himself and represented the other plaintiffs as their general attorney. As the plaintiffs were present, the Court could not take action under R. 3 and the only rule under which it could proceed was R. 6. In proceeding under R. 6 it had to consider whether the plaintiffs' case was proved and it could either decree the claim or dismiss it. In the present case the Court dismissed the claim. We must hold that the case was dismissed under O. 9, R. 6, because the plaintiffs did not satisfy the Court by the evidence on the record or any evidence which they might have produced that their case was a true one. The Court, it is true, did not say that it dismissed the suit because no evidence was adduced which satisfied the Court that the claim was a true one, but the Court said that there was an absence of prosecution. These words can only be understood as meaning that the plaintiffs did nothing to support their claim, that is to say, that there was no evidence which established the claim. The Court's action could only be under

O. 17, R. 3, that is to say, the Court decided the case upon the materials before it. We are unable to hold that under these circumstances the suit must be deemed to have been dismissed under O. 17, R. 2, read with O. 9, R. 3. It was not a case in which the plaintiffs were absent nor was it a case in which the plaintiffs' pleader was present but had no instructions. If §R. 3, O. 9, had applied, the plaintiffs certainly would have been entitled to bring a fresh suit.

As that rule, under the circumstances of the present case, could not apply, the dismissal can only be regarded as one on the merits and thus bars the institution of a fresh suit. It is true that when an application was made to the Court to restore the suit to its original number, the Court seemed to think the dismissal was one under O. 9, R. 3, but as has already been pointed out, that dismissal as a matter of fact was not and could not be one under O. 9, R. 3, and therefore no application could be made under R. 4 of that order. We think that the view taken by the Court of first instance was right. We accordingly allow the appeal, set aside the order of the Court below and restore the decree of the Court of first instance with costs.

V.B./R.K.

Appeal allowed.

A. I. R. 1918 Allahabad 335

BANERJI, J.

Chhote Lal—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 95 of 1918, Decided on 22nd March 1918, from order of Dist. Magistrate, Shahjahanpur.

Criminal P. C. (1898), S. 437 — Charge framed in warrant case—Accused pleading not guilty—Magistrate writing judgment "discharging" accused—Accused must be deemed to have been acquitted—Further inquiry under S. 437 is not competent.

In a warrant case after a charge had been framed against the accused he was called upon to plead, and he pleaded not guilty. The Magistrate thereupon wrote a judgment and 'discharged' the accused. This order was set aside by the District Magistrate, who ordered further inquiry under S. 437.

Held: that the only order which the Magistrate could have passed after a charge had been framed against the accused and he had pleaded to the charge, was either an order of acquittal or an order of conviction and as he was not convicted he must be deemed to have been acquitted and not 'discharged' and that being so, the District Magistrate was not competent under S. 437 to

order further inquiry and the order made by him therefore for such inquiry was illegal.

[P 336 C 1]

Gulzari Lal—for Applicant.

R. Malcomson—for the Crown.

Judgment.—Chhote Lal, the applicant, was charged with having rescued his father, who had been arrested under the orders of the Revenue Court in execution of a decree passed by that Court. The Magistrate who tried him recorded the evidence for the prosecution, framed a charge against him and called upon him to plead. The record shows that the accused pleaded not guilty but refused to call witnesses. A date was fixed for the hearing of the case after the charge had been framed and the plea of not guilty had been entered; and on that date, for reasons stated in the judgment, the Magistrate trying the case passed an order of "discharge." This order was set aside by the District Magistrate and a further inquiry was ordered. The present application has been filed against the order of the District Magistrate directing a further inquiry by another Magistrate.

It is contended that the order of the Magistrate who tried the case, though it is in terms an order of discharge is in substance and reality an order of acquittal, and that therefore the District Magistrate was not competent under S. 437 to order further inquiry. Under the section last mentioned the Magistrate of the district is authorized to order further inquiry in a case of dismissal of a complaint under S. 203 or S. 204, Criminal P. C., or in a case in which the accused has been discharged. The real question therefore in this case is whether the order of the trial Magistrate passed on 18th June 1917 was an order of "acquittal," because if it was an order of "acquittal" further inquiry could not be ordered by the District Magistrate. S. 253, Criminal P. C., provides that if upon taking all the evidence and making such examination of the accused as the Magistrate thinks necessary, he finds that no case against the accused has been made out, which if un rebutted would warrant a conviction, the Magistrate shall discharge him. It is thus clear that an order of discharge should be made before a charge has been framed. S. 254 provides for the framing of a charge if the Magistrate is of opinion that there is ground for presuming that the accused

has committed the offence with which he is charged. The present case was a "warrant case" and therefore S. 253 and the following sections applied to the case. Under S. 255, the Court is required to ask the accused after a charge has been framed and read out and explained to him whether he is guilty or has any defence to make. In the present case it appears from the record that after the charge had been framed, the accused was called upon to plead and he pleaded not guilty. The only order which the Magistrate could have passed after the accused had pleaded to the charge was either an order of acquittal or an order of conviction. In the present case the accused was not convicted. Therefore, he must be deemed to have been acquitted under S. 258. It is true that the Magistrate in his judgment used the word "discharged" but that was a misuse of the word. The only order which he could have passed, if he did not convict was an order of acquittal, and therefore the order passed on 18th June 1917 must be deemed to be an order of acquittal. This being so the District Magistrate was not competent under S. 437 to order further inquiry and the order made by him for such inquiry is illegal. I accordingly set aside the order of the District Magistrate, dated 14th August 1917.

V.B./R.K.

*Order set aside.***A. I. R. 1918 Allahabad 336**

RICHARDS, C. J. AND BANERJI, J.

Harish Chander—Auction-purchaser—Appellant.

v.

B. Ganga Bishun and another—Applicants—Respondents.

First Appeal No. 37 of 1917, Decided on 25th April 1917 from order of Addl. Judge, Gorakhpore, D/. 25th August 1915.

Limitation Act (1908), S. 18 and Art. 166—S. 18 applies only where person having right to make application has been by fraud kept from knowledge of his right—Civil P. C. (1908), O. 21, R. 89.

Section 18 applies only where a person having any right to make an application has by means of fraud been kept from the knowledge of his right. [P 337 C 1]

Where, therefore, a judgment-debtor was by the fraud of the judgment-creditor and the auction-purchaser induced to omit to make an application under R. 89 O. 21:

Held: that the fraud was not of the kind which would operate to extend the limitation provided for an application to set aside a sale on the ground of irregularity, inasmuch as it did not

keep the judgment-debtor from the knowledge of his rights but merely prevented him from making an application. [P 337 C 1]

S. M. Sulaiman and Tej Bahadur Sapru—for Appellant.

Sunder Lal, Gokul Prasad and Janki Prasad—for Respondents.

Judgment.—This appeal arises under the following circumstances. A decree had been made against the respondent Ganga Bishun. In execution of that decree certain property was put up for sale, sold and purchased by Harish Chander. Thereupon Ganga Bishun made an application on 18th January 1915 to have the sale set aside. It must be remembered that the sale had taken place on 22nd September 1914. The allegations in the application were as follows: That there had been several irregularities in connection with the sale including undervaluation of the property, that the judgment-debtor did not become aware of the sale until 19th October 1914, on which date he went to the auction-purchaser and the decree-holder and complained of what had happened. He was informed that no harm would be done, that if he paid the auction purchaser the price which he had paid together with 5 per cent, the sale would be set aside. He says that he paid this amount and was lulled into security which prevented him from making any application until January 1915, when he was awakened by the sale being confirmed and possession being taken by the purchaser. It was further alleged that Harish Chander was in reality a nominee of the decree-holder who had not been allowed to bid at the sale. The time prescribed by law for an application to set aside a sale on the ground of irregularity or fraud in the publication or conduct of a sale is thirty days from the date of the sale. It is unnecessary to remark that the thirty days had long expired. Even if we assume that time began to run from the judgment-debtor's knowledge, it is admitted that he knew of everything that had happened and his own rights in October 1914.

The judgment-debtor seeks to relieve himself from his neglect to make his application at an earlier date by virtue of the provisions of S. 18, Act 9 of 1908 (Limitation Act). By that section it is provided that where any person having any right to make an application has by means of fraud been kept from the know-

ledge of his right, then time should be computed from the date when the fraud first became known. The applicant says that he only became aware of the fraud when possession was being taken. But the fraud mentioned in S. 18 is the fraud of keeping him from the knowledge of his right. Now it is not alleged that the judgment-creditor or the auction-purchaser ever kept the judgment-debtor from the knowledge of his right. If there was fraud at all, it was the fraud of inducing him to omit to make the application upon the promise that they would themselves have the sale set aside. In our opinion these facts, even if proved by the judgment-debtor, cannot possibly extend the time prescribed by the law for a judgment-debtor to apply in a suit to have the sale set aside. This being so, the order of the Court below was wrong. We must allow the appeal, set aside the order of the Court below and restore the order of the first Court with costs in all Courts.

V.B./R.K.

*Appeal allowed.***A. I. R. 1918 Allahabad 337**

RICHARDS, C. J. AND BANERJI, J.

Alamdar Husain—Plaintiff — Appellant.

v.

Motiram and others—Defendants — Respondents.

Second Appeal No. 938 of 1916, Decided on 26th April 1918, from a decree of Dist. Judge, Moradabad.

Transfer of Property Act (1882), S. 54—Right intended to pass by bargain—Non-payment of portion of consideration does not affect—Non-payment is sometimes strong evidence of non-enforceability of deed.

Where parties enter into a bargain for the sale of property of any nature, if the real intention is that the right to property should pass, the mere fact of non-payment of part or even the whole of the consideration will not make the deed of transfer "fictitious."

[P 338 O 1]

The non-payment of consideration, however, may often be very strong evidence that the deed was not intended to operate.

[P 338 O 2]

S. M. Sulaiman for Iqbal Ahamed—for Appellant.

Peary Lal Banerji—for Respondents.

Judgment.—This appeal arises out of a suit brought under the following circumstances. Defendants 2 and 3 had sold some property to Moti Ram, defendant 1. As the result of that transaction Moti Ram owed the defendants 2 and 3 the sum of Rs. 800. Defendants 2 and 3 sold their

rights to the plaintiff by a deed, dated 19th May 1914. The consideration as set out in the sale deed was as follows: Rupees 188-8-0 already due by the ladies to the plaintiff, Rs. 150 paid before the Registrar and a covenant to pay the balance of the purchase money (Rs. 750) by monthly instalments of Rs. 20. The plaintiff instituted the present suit and he made parties thereto the original debtor, Moti Ram, and the two ladies. Moti Ram pleaded that he had already paid the debt. The ladies pleaded that they had not got the consideration which the plaintiff agreed to give them. It is true that they alleged in the written statement that the deed was "fictitious," but it is equally clear from their evidence and from the details of their pleas that they never intended to allege that the deed was never intended to be acted upon or that they did not intend to transfer the right to sue Moti Ram to the plaintiff. On the contrary it is quite clear from the evidence of the ladies themselves that they intended that the right to sue should pass to the plaintiff.

Their real allegation was that the plaintiff had not fulfilled his bargain with them. The Courts below have found that Moti Ram never paid the ladies. There was also a finding by the Courts that the consideration for the assignment had not been paid by the plaintiff to the ladies. This finding was arrived at in this way. The Court found that the Rs. 188-8-0 was never due. If this finding be correct, it would rather go to show that the price which the plaintiff is supposed to have given to the ladies was intentionally inflated by both sides. This would not be at all an unreasonable view to take, and it is supported by some remarks which the learned District Judge makes in the course of his judgment. He seems to consider that Rs. 750 would have been a very large sum for the plaintiff to pay for the right to recover Rs. 800 from Moti Ram. Rs. 150 was really paid before the Registrar but the ladies say, and their evidence was believed by the District Judge, that immediately after the payment of the Rs. 150 the plaintiff said to the ladies that he wanted that money to commence the litigation against Moti Ram. This would really mean that the Rs. 150, part of the consideration, was paid but was immediately borrowed again by the plaintiff. With regard to the rest of the consideration it was not intended by the

terms of the deed that it should be paid at once. But there was a covenant that the balance should be paid by monthly instalments of Rs. 20. We may at once remark that where parties enter into a bargain for the sale of property of any nature, if the real intention is that the right to the property should pass, the mere fact of non-payment of part or even the whole of the consideration will not make the deed of transfer "fictitious". The non-passing of consideration may often be very strong evidence that the deed was not intended to operate. But in the present case upon the pleas of the ladies themselves and on their evidence it is absolutely clear that the intention was that the right to sue Moti Ram for the Rs. 800 should pass to the plaintiff. The very evidence which was given with regard to the Rs. 150 shows this, because the ladies themselves say that the plaintiff told them he wanted the Rs. 150 to bring a suit. Both the Courts below have dismissed the suit against Moti Ram. Having regard to the finding that Moti Ram owed the money and that he had not repaid the money to the ladies, this decision seems to have been a very unsatisfactory one to every one concerned except to Moti Ram. The ladies, assuming that they were defrauded to some extent by the plaintiff, would get absolutely nothing. We think, upon the facts as found by the Court below, the plaintiff was clearly entitled to a decree for the full amount claimed against Moti Ram. Defendants 2 and 3 have not appealed but even in their absence, we think, we can give some effect to the finding of the Court below, namely, that they did not receive the consideration. We think that they should have a lien or charge on the amount which the plaintiff realises under the decree which we intend to pass for the sum of Rs. 600.

We allow the appeal, set aside the decree of both the Courts below, grant the plaintiff a decree against Moti Ram for the amount claimed including interest up to the date of the decree at the rate claimed, with further interest from the date of the decree to the date of realisation at 6 per cent. per annum on Rs. 800, the principal amount claimed, and costs. We allow costs in all Courts including in this court fees on the higher scale. We direct that defendants 2 and 3 shall have a lien or charge against the plaintiff for

the sum of Rs. 600 on the amount realised by the plaintiff from Moti Ram, that is, when the amount is realised it will be allocated in the following way, namely, in the first place in payment of the plaintiff's costs and in the next place in payment to the defendants 2 and 3 to the extent of Rs. 600 and the balance to the plaintiff.

V.B./R.K.

Appeal allowed.

A. I. R. 1918 Allahabad 338

BANERJI, J.

Barkat Ali and another—Applicants.

v.

Emperor—Opposite Party.

Criminal Revn. No. 701 of 1917, Decided on 25th September 1917, from order of Sess. Judge, Gorakhpur, D/- 11th July 1917.

Forests Act (1878), S. 25 (i)—Accused with two others going into reserved forest for hunting—Other two shooting deer—All are guilty under S. 25 (i).

Accused with two others formed a party and went to a reserved forest with the object of hunting. The other two shot two deer in the forest:

Held: that notwithstanding that the accused did not actually shoot in the forest they were guilty of hunting in the forest without a permit within the meaning of S. 25 (i) and the rules framed thereunder. [P 338 C 2]

*S. C. Mukerji—*for Applicants.

*S. P. Ghosh—*for the Crown.

Judgment.—The applicants Barkat Ali and Hamid Ali have been convicted under S. 25, Forests Act (7 of 1878). The former has been sentenced to a fine of Rs. 50 and the latter to a fine of Rs. 40. It appears that these two persons along with two others went into a reserved forest. The other two persons who were tried along with the applicants Barkat Ali and Hamid Ali shot two deer. For this all the four persons were placed on their trial. It has been found that the four persons formed a party and went to the forest with the object of hunting. They had no permit and therefore they were punished under the section mentioned above for violating the rules framed under Cl. (i) of the section. It is true the two applicants did not actually shoot any deer. As the section makes shooting punishable they could not be convicted of shooting in a reserved forest, but they were certainly hunting and hunting without a permit is punishable under the section. Therefore the two applicants have, in my opinion, been rightly convicted. The sentences how-

ever seem to be severe. I accordingly reduce the sentence in the case of Barkat Ali to a fine of Rs. 25 and in the case of Hamid Ali to one of Rs. 20. Any sum paid in excess of the above amounts will be refunded.

V.B./R.K.

Sentences reduced.

A. I. R. 1918 Allahabad 339

TUDBALL AND ABDUL RAOOF, JJ.

Moti Ram—Plaintiff—Appellant.

v.

Banke Lal—Defendant—Respondent.

Second Appeal No. 822 of 1916, Decided on 18th May 1918, from decree of District Judge, Agra.

Civil P. C. (5 of 1908), Ss. 11 and 47 and O. 34, R. 5—Suit on mortgage—Subsequent purchaser setting up prior mortgage redeemed by him—His claim recognized by preliminary decree but not included in final decree—Property sold and purchased by decree-holder—Suit by subsequent purchaser for possession till his lien is paid off is barred both under Ss. 11 and 47.

Defendant brought a suit on a mortgage against the plaintiff, who was the purchaser of the equity of redemption of the mortgaged property and had paid off a prior mortgage. The plaintiff set up the prior mortgage as a shield and the preliminary decree recognized his lien. But no mention of his lien was made in the final decree and the property was sold and purchased by the defendant, who took possession of it without discharging the plaintiff's lien. The plaintiff thereupon applied to be put in possession of the property until his lien was discharged. The application was rejected and plaintiff then brought a suit to recover the amount of his lien:

Held: that the suit was barred both by the principle of res judicata and by S.47, [P 341 C 1]

*Shiam Krishna Dar—*for Appellant.

*M. L. Agarwala—*for Respondent.

Judgment.—The facts of this case are as follows: The property in dispute was owned by one Kallan. There was an usufructuary mortgage upon it for the sum of Rs. 290. It was subsequently mortgaged to Banke Lal, the defendant, under two deeds dated 20th February 1895 for Rs. 150 and 27th June 1895 for Rs. 150. The property, i. e., the equity of redemption, was subsequently sold in execution of a decree on 28th March 1900 and was purchased by the plaintiff, Moti Ram. In that year 1900, Banke Lal brought a suit on his first deed of 20th February 1895 for sale of the property and he joined Moti Ram as a defendant. In this suit Banke Lal mentioned the prior usufructuary mortgage and the fact that Rs. 290 thereon

was due to Mathura Prasad, the mortgagee. He offered to pay this sum. He prayed for a decree for sale. He paid off the Rs. 290. His decree was dated 16th July 1900 and he got a final decree for sale on 23rd February 1901. In neither of these decrees was there any specific mention of the sum of Rs. 290, but it was actually paid into Court by Banke Lal and was withdrawn by the prior mortgagee in July 1901. The property was not sold as Moti Ram came to terms with Banke Lal. A certain sum of money was paid down in 1901 and other sums were paid on subsequent dates up to the year 1904, when the full claim of Rs. 737 odd was paid off by Moti Ram. This included the sum of Rs. 290 mentioned above. In 1909 Banke Lal brought a suit on the basis of his second mortgage, dated 27th June 1895, and he asked for sale of this property.

Moti Ram was impleaded as a defendant. He proceeded to hold up as a shield his rights which had accrued to him by payment of the sum due on the two prior mortgages mentioned above, i. e., the sum of Rs. 737 odd. In his defence he made a mistake in figures, but it was finally admitted that the sum which he had paid was Rs. 737 odd. His case was that the plaintiff Banke Lal had no right to sell this property without first paying off to him the above-mentioned sum. The Court in its judgment held that he was legally entitled to hold up this shield; and it held further that the property could only be sold "subject to his lien" (whatever the Judge may have meant thereby). A preliminary decree for sale was drawn up and mention of the lien was entered therein. The decree-holder Banke Lal applied for his final decree in accordance with the preliminary decree. Notice was issued to Moti Ram. He did not appear. A final decree was drawn up, which was simply an order for the sale of the property without mentioning Moti Ram's lien in any way. The property was then put to sale in execution of the decree and was purchased by Banke Lal himself. Banke Lal did not deposit any sum for payment to Moti Ram. He applied for possession as auction-purchaser and in May 1912 was put into possession by the Court. Thereupon Moti Ram made an application to the Court, pointing out that the money had not been paid to him and asking

that he might be replaced in possession of the property until the money had been paid. The Court held that it could not go into this matter in the course of the execution of the decree and that if Moti Ram had any remedy he must seek it by a separate suit, hence the suit out of which this appeal has arisen. Moti Ram has claimed to recover the sum of Rs. 737 plus interest from Banke Lal by sale of the property in question. The Court of first instance decreed the claim. The lower appellate Court dismissed it as being barred by limitation. It held that Moti Ram was driven to sue upon the two original mortgages and as they dated back to 1895 in the one case and prior to that in the other, the suit was barred by limitation.

The pleas taken before us are, first of all, that the present suit is a suit to enforce a liability created by the judgment which was passed between the parties in Banke Lal's second suit; that Art. 122 applies, and that the suit is within time. In the alternative it is urged that it is a suit to enforce a charge under Art. 132; that no charge arose in favour of the plaintiff until the decision of the suit or at least until the years 1901 to 1904 when he paid the money; since which time there have been certain acknowledgments of liabilities made by Banke Lal, which under S. 19, Lim. Act, would operate to extend limitation. There has been a great deal of discussion over the meaning of Ss. 74 and 101, T. P. Act, but we do not think that they are at all relevant to the point that we have to decide. S. 101, T. P. Act, does not apply to the case in question. Moti Ram was not the owner of a charge or encumbrance who had become absolutely entitled to the property. He was a person who had become entitled to the property by auction-purchase: who subsequently paid off two prior mortgages and when he was sued by Banke Lal, he, by the application of equitable principles, was entitled to hold up the payments that he had made as a shield and to demand that Banke Lal should repay to him that sum before he could oust him from the property. The judgment in the suit between him and Banke Lal did not create a liability. It merely declared the right of Moti Ram and did not create it. We do not think that Art. 122 has any application to the facts of the present

suit. In both the Courts below the defendant raised the plea that this suit was barred by the provisions of S. 47, Civil P. C. The first Court dismissed this plea in two lines. The lower appellate Court did not touch it. It has been raised and discussed before us. We have summoned the Collector's record of the sale proceedings in order to satisfy ourselves as to what took place therein between the parties; but it has been of no assistance, as the proclamation of sale is not to be found in it. If this suit were treated as one upon the original mortgages, it would be barred by limitation. It clearly cannot be treated as a suit based upon the previous judgment and to enforce a liability created thereby, and Art. 122, Limitation Act, does not apply. Nor does Art. 132 apply. Even if it did, the bar of limitation would still be there as we have not been able to find the alleged acknowledgments.

The plaintiff's present position is due to his own negligence. He was duly impleaded in Banke Lal's last suit and he rightly raised the plea that the property could not be sold until the sum of Rupees 737 had been paid to him. The Court passed a wrong decree directing the property to be sold subject to his lien. It ought to have directed Banke Lal to pay the money before he put the property to sale. The plaintiff remained satisfied with that decree. If we assume that the Court meant by the words "subject to the lien of Moti Ram" that the money was to be paid before the property was sold, then Moti Ram has been most negligent. Even when the final decree was prepared, he did not appear to see that the decree was properly drawn up and as a matter of actual fact it omitted all mention of his rights. When the decree was put into execution and notice issued to him, he did not appear and the property was sold and possession awarded. He then came into Court and asked to be replaced into possession. The Court refused his plea and he did not appeal.

It is clear that no separate suit will now lie. The matter was one that ought to have been raised and actually was raised between the parties in the previous litigation and Moti Ram asked for the relief to which he was entitled, viz., that the property should not be sold until he had been paid off. The Court's decree did not in terms grant him that

relief. If its decree be taken as a refusal to grant the relief he cannot now sue for it again. If it be taken as having granted him that relief, he ought to have enforced it in the execution department and no separate suit will lie. If the present suit be treated as an application in the execution proceedings, he is met with the fact that the final decree is silent on the point and no attempt has been made to make it agree with the preliminary decree. If that error be now amended, he will then be met with the fact that when notice was issued to him he took no objection and when after the property had been sold he came into Court and the Court refused to give him his relief in those proceedings, he remained satisfied with that order. The principle of the rule of *res judicata* must be applied. He ought to have appealed and obtained his relief then and there. He cannot reopen the point again by a fresh application in the execution proceedings. We can see no way of giving him relief now, and he has merely himself and his own negligence to thank for his present difficulty. The appeal must fail and we dismiss it. In the circumstances of the case however we order the parties to bear their own costs of this appeal.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1918 Allahabad 341

RICHARDS, C. J. AND BANERJI, J.

Bal gobind Rai and others — Petitioners.

v.

Sheoraj Rai—Opposite Party.

Civil Revn. No. 206 of 1917, Decided on 25th April 1918, against order of Dist. Judge, Azamgarh.

Civil P. C. (1908), S. 152 — Amendment of decree—Decree affirmed by appellate Court — To get amendment variance between appellate judgment and decree must be shown.

In a suit on foot of a mortgage the plaintiff claimed the principal sum, interest up to date of suit and interest *pendente lite* and future interest. The Munsif decreed the plaintiff's claim "as proved" with costs and directed a decree to be prepared in the terms of S. 88, T. P. Act. The decree was drawn up and it awarded the plaintiff interest at the contractual rate up to the institution of the suit and up to the date fixed for payment and future interest at 6 per cent. per annum. Defendant's appeal was dismissed and the decree was made absolute. The defendant subsequently applied to the District Judge to amend the decree on the ground that there was a variance between the Munsif's judgment and his decree. The District Judge granted the

application and amended the decree by ordering the provision for future interest and interest *pendente lite* to be deleted :

Held : that in order to obtain an amendment of the decree it was necessary for the defendant to show, not a variance between the judgment of the Munsif and the decree of the Munsif, but a variance between the judgment of the District Judge and the decree of the District Judge and that there being no such variance the application should have been dismissed. [P 342 C 1]

Peary Lal Banerji—for Petitioners.

Kamala Kant Varma — for Opposite Party.

Judgment.—This application in revision arises under the following circumstances. In the year 1905 a suit was brought on foot of a mortgage. The plaintiff claimed the principal sum, interest up to date of suit and interest *pendente lite* and future interest. The Munsif decreed the plaintiff's claim "as proved" with costs and directed a decree to be prepared in the terms of S. 88, T. P. Act. The decree was drawn up and it awarded the plaintiff interest at the contractual rate up to the institution of the suit and up to the date fixed for payment and future interest at 6 per cent. per annum. The defendant appealed. He took no exception to any alleged variance between the judgment of the Munsif and the decree. The District Judge dismissed the appeal. The decree was made absolute in the year 1906. The decree was put into execution from time to time and partially executed. The present application was made in May 1917 to the District Judge to bring the decree into accordance with the judgment.

The learned Judge granted the application and amended the decree by ordering the provision for future interest and interest *pendente lite* to be deleted. It is against this order that the present application is made. On the general merits it seems to have been a very belated application. As a matter of fact the decree only awarded the plaintiff what he was legally entitled to. The judgment of the Munsif was certainly capable of being read as decreeing all that the plaintiff claimed and if this were the proper construction of the judgment, there would have been no variance between it and the decree. But the application for amendment of the decree had to be made to the District Judge. Now the District Judge's judgment was to uphold the decree of the Munsif and to dismiss the appeal. It was necessary for the applicant to show, not

a variance between the judgment of the Munsif and the decree of the Munsif, but a variance between the judgment of the District Judge and the decree of the District Judge. It is quite clear that there was no variance of any kind between the judgment and the decree of the District Judge. We hold that the Court below had no jurisdiction to amend the decree. We accordingly set aside its order and dismiss the application for amendment dated 17th May 1917 with costs in both Courts. Costs in this Court will include fees on the higher scale.

V.B./R.K. *Application dismissed.*

A. I. R. 1918 Allahabad 342 (1)

RICHARDS, C. J. AND BANERJI, J.

People's Industrial Bank Ltd. — Objector—Appellant.

v.

Harkishan Lal—Applicant — Respondent.

First Appeal No. 55 of 1917, Decided on 20th December 1917, from order of Dist. Judge, Allahabad, D/-4th April 1917.

(a) *Companies Act (1882), S. 169—Winding up of company commencing before new Act coming into operation—Company must be wound up according to old Act — Companies Act (1913), S. 155.*

Every company the winding up of which commenced before the Companies Act of 1913 came into operation must be wound up in the same manner and with the same incidents as if the new Act had never been passed. [P 342 C 2]

(b) *Company—Winding up—Order directing preferential payment to be made to creditor of bank in liquidation is incident of winding up—Right of appeal is also incident of winding up.*

An order directing a preferential payment to be made to a creditor of a bank in liquidation relates to and is an incident of the winding up and the right of appeal against such an order is also an incident of the winding up. [P 342 C 1]

Therefore in the case of a bank the winding up of which commenced before the coming into operation of the Act of 1913 an appeal against such an order without complying with the provisions of S. 169, Act 6 1882, is incompetent. [P 342 C 1]

Sham Nath Mushran—for Appellant.

Kailas Nath Katju—for Respondent.

Judgment.—A preliminary objection is raised to the hearing of this appeal. The liquidation in the present case of the bank began in January 1914, or at the very latest February 1914. The order of the Court below which it is sought to appeal from was made on 4th April 1917. The appeal was filed on 3rd May 1917, and notice of the appeal was given to the respondent on 31st May 1917. The objec-

tion is that under the provisions of S. 169, Act 6 of 1882, notice of the appeal ought to have been given within three weeks of the date of the order complained of. There is no doubt that S. 169 does contain such a provision. S. 284, Act 7 of 1913, provides that the provisions of that Act shall not apply to any company the winding up of which has commenced before the commencement of the Act, but that every company the winding up of which has commenced before the new Act came into operation shall be wound up in the same manner and with the same incidents as if the new Act had never been passed. In the present case it is quite clear that the winding up of the People's Industrial Bank, Limited, began in January or February 1914, that is before the new Act came into operation. It is contended that the order in the present case had nothing to do with the "winding" up of the bank. We cannot accede to this contention. The order was an order directing a preferential payment to be made to a creditor and clearly related to and was an incident of the winding up and the right of appeal also is clearly an incident of the winding up. We accordingly must allow the preliminary objection and dismiss the appeal with costs including in this Court fees on the higher scale.

R.M./R.K. *Appeal dismissed.*

A. I. R. 1918 Allahabad 342 (2)

RICHARDS, C. J. AND BANERJI, J.

Nathu and another—Defendants—Appellants.

v.

Mt. Tulsha—Plaintiff—Respondent.

Second Appeal No. 1280 of 1916, Decided on 2nd April 1918, from decree of Dist. Judge, Jhansi.

Hindu Law — Alienation—Widow — Deceased's relative undertaking to pay off his debts but not paying it off—Alienation by widow to pay off that debt—Failure to pay by relative does not form good consideration.

A Hindu widow sold her husband's property in her possession in order to discharge debts of the deceased, which a relative of his had agreed to pay off but which he failed to discharge:

Held: that when the relative of the deceased made himself responsible and agreed to pay off the debts, they ceased to be debts either of the deceased or of his widow, and the mere fact that the relative failed to perform his obligation would not revive the debts so as to make them a good consideration for the alienation of the property by the widow. [P 343 C 1]

A. H. C. Hamilton—for Appellants.

A. P. Dubey—for Respondent.

Facts.—Gillay, who possessed some immovable property, died in 1890 leaving one widow and two daughters, Tulsha the plaintiff, and Bari Bai. In 1892 one Har Parshad sued the widow for the debts due to him by her deceased husband. Kunji, a relative of the deceased, undertook to pay the debts, and Har Parshad allowed the suit to be dismissed in default. Kunji agreed to pay the money in instalments. He made default, and on 8th July 1896 Har Parshad obtained a decree against him for the first three instalments. In 1907 the widow sold a part of the property to Nathu and Mannu, defendants. The widow died in 1914 and her daughter Bari Bai, having died before her. Mt. Tulsha, being now the sole survivor sued to recover the property from the defendants, on the ground that the sales to them were collusive and obtained by undue influence and not for consideration and legal necessity. The suit was decreed by both the Courts, the lower appellate Court holding that the contract between Har Parshad and Kunji extinguished Gillay's debt.

Judgment.—We think the view taken by the Court below was correct on the findings of fact arrived at by it. Assuming that there was a debt due by Gillay which it was the legal and pious duty of the widow to discharge, that debt was discharged by Kunji taking over the liability and agreeing to pay it off by instalments. It then ceased to be a debt either of Gillay or his widow. The mere fact that Kunji did not perform his obligations would not revive the debt so as to make it a good consideration for the alienation of the property. We dismiss the appeal with costs.

V.B./R.K.

Appeal dismissed.

A. I. R. 1918 Allahabad 343

KNOX, J.

Lalji and others—Applicants.

v.

Emperor—Opposite Party.

Criminal Ref. No. 1014 of 1917, Decided on 14th December 1917, made by Sess. Judge, Bareilly, D/- 22nd November 1917.

(a) Criminal P. C. (1898), S. 125—District Magistrate can for sufficient reasons cancel bond for keeping peace provided bond is given on order by subordinate Court.

A District Magistrate has power at any time

for sufficient reasons to be recorded in writing to cancel any bond for keeping the peace provided the bond be one given in obedience to an order of a Court in his district not superior to his Court.

[P 343 C 2]

(b) Practice — Jurisdiction — Particular Court given jurisdiction to act—That Court should be appealed to and not High Court.

Where a Code gives a particular Court jurisdiction to act it is that Court which should be applied to and not the High Court. [P 344 C 1]

Judgment.—A Magistrate of the First Class in Bareilly ordered three persons to execute a bond for keeping the peace. The persons so bound applied to the Sessions Judge for a revision of this order. The learned Sessions Judge went into the reasons set out by the Magistrate for passing his order and came to the conclusion that the applicants should not have been bound over and that the order binding them over should be set aside. He considered that under the ruling *Banarsi Das v. Partab Singh* (1), this could only be done by reference to this Court. He has accordingly sent the case up with a recommendation that the order be set aside. The case before me however differs from the case of *Banarsi Das v. Partab Singh* (1). In this last case the District Magistrate had treated it as though it were an appeal and cancelled the order of the lower Court. It was held that the order of the District Magistrate was void as an order passed without jurisdiction. There is no sign however that the case before me is a case of an appeal from an order of the Magistrate of the First Class. It appears to me that the District Magistrate has power at any time for sufficient reasons to be recorded in writing to cancel any bond for keeping the peace provided that the bond be one given in obedience to an order of a Court in his district not superior to his Court. In the present case the Magistrate who passed the order was a Magistrate subordinate to the District Magistrate and I agree entirely with what was said in the concluding sentence of this Court's judgment in *Banarsi Das v. Partab Singh* (1) thus far, namely, "the matter is one concerning the peace of the district and I think it advisable in the circumstances of the case that the record should be placed before the present District Magistrate so that he may examine it himself and see whether or not it is any longer necessary to keep the opposite party under his bond."

I see nothing in the words contained in S. 125, Criminal P. C. to prevent the District Magistrate from cancelling the

bond for reasons other than that the persons bound over can be released without hazard to the community or any other person. Where a Code gives a particular Court jurisdiction to act it has been held by this Court on several occasions that it is that Court which should be applied to and not this Court. I decline to interfere but direct that the record be laid before the District Magistrate in order that he may, if he thinks fit deal with it under S. 125, Criminal P. C.

V.B./R.K.

*Record returned.***A. I. R. 1918 Allahabad 344**

TUDBALL AND ABDUL RAOOF, JJ.

Deoki Nandan—Plaintiff—Appellant.

v.

Gapua—Defendant—Respondent.

Second Appeal No. 1097 of 1916, Decided on 19th March 1918 from a decree of Dist. Judge, Agra.

Limitation Act (9 of 1908), Arts. 80 and 120—Cattle hypothecated as security for loan—Suit for enforcement of lien—No personal relief claimed—Art. 120 applies.

Where a bond hypothecates certain cattle as security for the loan and the creditor sues to enforce the bond as a lien on the cattle and does not ask for a personal decree against the debtor the limitation applicable to the suit is that contained in Art. 120. [P 344 C 2]

Narmadeshwar Upadhya and *Surendra Nath Sen*—for Appellant.

Sital Prasad Ghosh for *Narayan Prasad Asthana*—for Respondent.

Judgment.—The question raised in this appeal is one of limitation. The plaintiff sued on the basis of a deed of 6th September 1911 to recover from the defendant the sum of Rs. 283, principal and Rs. 447 interest, total Rs. 730 together with costs and interest pendente lite and for the future, by enforcement of the hypothecation lien against eight black buffaloes. The defendant raised several pleas in defence; among them was the plea that the suit was barred by limitation. The Court of first instance found that the bond had been executed and that the money was due but it held that the suit was barred by limitation and on that ground it dismissed it. The plaintiff appealed. The lower appellate Court held that the suit was one falling under Art. 80, Sch. 1, Limitation Act, which allowed a period of three years from the date on which the bond became payable and as the suit had been brought in the year 1915 it dismissed it as being barred by time. The plea taken before us, is

that under the rulings of this Court, of the Calcutta High Court and also of the Madras High Court the Article applicable to the present suit is Art. 120, Sch. 1, and attention is called to the rulings in *Mahalinga Nadar v. Ganpathi Subbien* (1), *Madan Mohan Lal v. Kanhai Lal* (2) and *Nim Chand Baboo v. Jagabundhu Ghose* (3). The ruling in *Nim Chand Baboo v. Jagabundhu Ghose* (3) was quoted before the lower appellate Court, but it preferred to follow the ruling in *Vitla Kamti v. Kalekara* (4). Apparently its attention was not called to the fact that this had been overruled in the case of *Mahalinga Nadar v. Ganpathi Subbien* (1). Also the ruling of this Court appears not to have been quoted before it. We think that these rulings are applicable to the facts of the present case for it is clear that the plaintiff does not seek by his suit to get a personal decree against defendant but only to enforce the payment of the money charged upon the buffaloes which were pledged as security. A claim against the person of the defendant is clearly barred by limitation but the decision of this point is not quite sufficient for the decision of the suit. It is impossible to give the plaintiff a decree for his money recoverable by the sale of any eight buffaloes. It is by no means clear that these eight buffaloes are still in existence. It is clear that the only property which can be put to sale is the property which was actually hypothecated on 6th September 1911. Before giving the plaintiff a decree we must have a finding from the Court below on the following issue:

Are the eight buffaloes which were hypothecated on 6th September 1911, still in possession of the defendant? If so a clear and distinct description of the animals must be given so as to enable the Court which executes the decree to execute it properly.

V.B./R.K.

Issue remitted.

1. (1904) 27 Mad 528 (F B).
2. (1895) 17 All 284.
3. (1895) 22 Cal 21.
4. (1888) 11 Mad 153.

A. I. R. 1918 Allahabad 345

BANERJI, J.

Thakur Das and others—Applicants.

v.

Emperor—Opposite Party.

Criminal Revn. No. 726 of 1917, Decided on 1st October 1917, from order of Sess. Judge, Muttra.

(a) Criminal P. C. (1898) S. 196-A—Words "not punishable with death, transportation or rigorous imprisonment for two years or upwards" do not apply to non-cognizable offence.—District Magistrate empowered under S. 196-A can sanction prosecution of non-cognizable offence without regard to amount of punishment.

The words "not punishable with death, transportation or rigorous imprisonment for a term of two years or upwards" in S. 196-A, Criminal P. C., govern only a cognizable offence and have no application to the case of a non-cognizable offence. A District Magistrate empowered under the section has therefore authority to sanction prosecution for a non-cognizable offence without regard to the amount of punishment provided therefor. [P 345 C 2, P 346 C 1]

(b) Criminal P. C. (1898) S. 4(h)—Accused presenting petition to District Magistrate making allegations against Tahsildar — Magistrate treating it as complaint and recording statement of accused on oath in which latter making specific allegations of extortion and bribery — Petition held amounted to complaint.

Accused presented a petition in the Court of a District Magistrate and Collector in which he made various allegations against a Tahsildar, which if true constituted offences under various sections of the Penal Code. The Magistrate treated the petition as a complaint under the Code of Criminal Procedure and recorded the statement of the accused on oath, in which the latter made specific allegations of bribery and extortion against the Tahsildar.

Held: that the petition amounted to a complaint within the meaning of S. 4 (h), Criminal P. C. [P 346 C 1]

C. Ross Alston, A. H. C. Hamilton, J. M. Banerji and Satya Chandra Mukerji —for Applicants.

C. J. A. Hoskins—for the Crown.

Judgment.—The three applicants have been convicted under S. 120-B (1) read with S. 211, I. P. C. Their convictions have been upheld by the learned Sessions Judge. The facts of the case are fully set forth in the judgment of the learned Sessions Judge. They are briefly these: on 2nd November 1916 the applicant Daryao Singh presented a petition in the Court of Mr. Dampier, who was both Magistrate and Collector of Muttra, in which he made various allegations against the Tahsildar of Muttra. These allegations, if true, would constitute offences under various sections of the Penal Code, the

principal offence being one under S. 161. Mr. Dampier treated the application as a complaint under the Code of Criminal Procedure and recorded the statement of Daryao Singh on oath, in which he made specific allegations of bribery and extortion against the Tahsildar. The learned District Magistrate directed an inquiry under S. 202, Criminal P. C., and in the end dismissed the case under S. 203 of the Code. He then caused further inquiry to be held and finally sanctioned the prosecution of the three applicants under the sections mentioned above. They have been tried and convicted. The first contention raised on their behalf is that the sanction granted by Mr. Dampier as District Magistrate was illegal. I do not agree with the contention. S. 196-A, Criminal P. C., provides that no Court shall take cognizance of the offence of criminal conspiracy punishable under S. 120-B, I. P. C.,

"in a case where the object of the conspiracy is to commit any non-cognizable offence or a cognizable offence not punishable with death, transportation or rigorous imprisonment for a term of two years or upwards, unless the Local Government or a Chief Presidency Magistrate or District Magistrate empowered in this behalf by the Local Government has by order in writing consented to the initiation of the proceedings."

In these provinces the Local Government has made an order empowering District Magistrates to sanction prosecutions under this section. The contention on behalf of the applicants is that the words "not punishable with death, transportation or rigorous imprisonment for a term of two years or upwards"

govern not only a cognizable offence but a non-cognizable offence also. Having regard to the context of the section I do not think that it is open to that construction. As pointed out by the learned Sessions Judge the use of the word "any" before non-cognizable offence shows that the legislature did not intend that both in the case of a non-cognizable offence and a cognizable offence the proviso about their not being punishable with death, transportation or rigorous imprisonment for a term of two years or upwards would apply. If that had been the intention of the legislature, it was wholly unnecessary to make any mention of cognizable or non-cognizable offences. What the legislature intended apparently was that in the case of a non-cognizable offence the District Magistrate empowered under the section would have the authority to sanc-

tion prosecution, but in the case of cognizable offences he would have such power in respect of such offences only as are not punishable with death, transportation or rigorous imprisonment for a term of two years or upwards. It is clear that the intention of the legislature was to give authority to the Local Government or a Chief Presidency Magistrate or a District Magistrate who may be empowered in this behalf to sanction prosecutions in the case of minor offences only, but it may be that in making this provision the legislature overlooked the fact that there are non-cognizable offences which are punishable with imprisonment for a term of two years or upwards. However as the section stands, I do not think it is open to any other construction than that placed on it by the learned Sessions Judge.

The next contention is that the petition presented by Daryao Singh to Mr. Dampier was not presented to him as District Magistrate with the intention that he should take criminal action against the Tahsildar, but in his capacity as Collector and for the purposes of departmental inquiry. It is true that the petition was not headed as a petition presented to the District Magistrate, but the allegations made in it were to the effect that the Tahsildar had committed specific offences and in the statement which was made by Daryao Singh before Mr. Dampier he gave specific instances of them. His object clearly was that action should be taken under the Code of Criminal Procedure against the Tahsildar. The application was therefore a complaint. The Magistrate treated it as such. He ordered an inquiry under S. 202 and finally made an order under S. 203. That Daryao Singh's object was that the petition was to be treated as a complaint further appears from the petition sent by him to the Commissioner on 23rd December 1916, as set forth in the judgment of the Court below. Although it does not appear from the petition originally filed before Mr. Dampier whether it was filed before him in his capacity of Magistrate or in his capacity of Collector, the subsequent proceedings which took place and the conduct of Daryao Singh himself show that he intended it to be a complaint and that it was in fact a complaint against the Tahsildar. As regards the merits of the case they have been dealt with by the learned Sessions Judge, and I see no reason to

differ from his conclusion. As regards Daryao Singh, he is, as both the Courts below have held, only a tool in the hands of the other accused. He was therefore not liable to the same amount of punishment as that inflicted on the others. In his case I reduce the sentence to one of three months' rigorous imprisonment. The applications of the other two applicants are dismissed. The applicants must surrender to their bail to serve out the remainder of their sentence.

V.B./R.K. *Application rejected.*

A. I. R. 1918 Allahabad 346

PIGGOTT AND WALSH, JJ.

Pita Ram—Defendant—Appellant.

v.

Jujhar Singh and another—Plaintiff and Defendants—Respondents.

First Appeal No. 181 of 1915, Decided on 10th March 1917, from order of Sub-Judge, Jhansi, D/- 21st September 1915.

(a) Provincial Insolvency Act (1907), Ss. 22 and 46—Property of stranger seized by receiver in bankruptcy—His remedy is not confined to S. 22—He can file suit in civil Court in ordinary manner for return of property.

A stranger to the bankruptcy whose property has been wrongfully seized by the receiver in bankruptcy is not confined to the remedy given him by S. 22. He can, if he pleases, apply to the insolvency Court, inasmuch as S. 22 applies in express terms to his grievance. But he can, if he pleases, ignore the insolvency Court and sue in a civil Court for a return of his property in an ordinary action against a trespasser. If however he chooses to avail himself of the remedy provided by S. 22 and his application is dismissed on the merits, he cannot begin again and raise the same issues in a suit in a civil Court.

[P 347 C 1]

(b) Provincial Insolvency Act (1907), S. 22—Application under S. 22 is suit within meaning of Civil P. C. (1908), S. 11.

An application under S. 22, Provincial Insolvency Act, to recover property wrongfully seized by the receiver is a "suit" within the meaning of S. 11, Civil P. C.

[P 349 C 1]

Haribans Sahai—for Appellant.

Sital Prosad Ghosh—for Respondents.

Judgment.—This appeal arises out of an action brought by the plaintiff in the Court of the Munsif of Jhansi against two defendants for a declaration of title in respect of a varied assortment of property, including two houses, some crops and a quantity of moveable property, which he alleges to belong to him.

Defendant 1 had obtained a decree against defendant 2 in the same Court in the year 1911, for the sum of Rupees 386-7-4. In the year 1910 defendant 2

became insolvent within the jurisdiction of the Insolvency Court of the District Judge of Jhansi. No receiver was appointed, and the District Judge of Jhansi became empowered, under S. 23, Provincial Insolvency Act, 1907, to exercise the powers of a receiver. Being set in motion by defendant 1, the decree-holder or judgment-creditor, aforesaid, the District Judge, as such receiver, attached the property which is the subject-matter of this action, as being property of the insolvent, and it therefore vested in him as such receiver. The plaintiff, who alleged that the property was in fact his and that he was therefore "a person aggrieved," within the meaning of S. 22, Provincial Insolvency Act, by such act of attachment, applied to the Insolvency Court for the restoration of the property to himself as the rightful owner, or in other words, for an order under the said section reversing the act of attachment. Now it is to be observed that in accordance with the English Bankruptcy practice, a person in the position of the plaintiff in this action who is a stranger, so to speak, to the bankruptcy, and whose property has been seized wrongfully, according to his view of the case, by the receiver in bankruptcy, is not confined to the remedy given him by the Provincial Insolvency Act. He can, if he pleases, apply to the Insolvency Court, inasmuch as S. 22 applies in express terms to his grievance. But he can, if he pleases, ignore the Insolvency Court and sue in a civil Court for a return of his property in an ordinary action against a trespasser. In this particular case, the plaintiff would have been compelled to sue the District Judge, not in his capacity as such, but in his executive capacity as the receiver of the insolvent's property.

The application being made to the Insolvency Court, it was the duty of that Court to entertain it and, after hearing the evidence tendered on behalf of the applicant on the one hand, and on behalf of the insolvent's estate on the other hand, to decide the issues raised both of fact and law, and to dispose of the matter by a formal order determining the rights of the parties to the subject-matter of the application as in an ordinary suit. Now special regulations for procedure are contained either in the Act itself, or in the rules thereunder made by this Court, other than the provisions con-

tained in S. 47, Provincial Insolvency Act, which directs the Court, subject to the provisions of the Act, to follow the same procedure as it follows in the exercise of original civil jurisdiction. A proceeding which results from an application of the kind made by the present plaintiff in the Insolvency Act, and in which a question of title is raised by both sides, although it is not originated by a plaint, has otherwise all the attributes of a suit.

The evidence disclosed by the record of the hearing of the application in the Court of the District Judge which is now in question shows that, after a full hearing, the Court decided all the issues against the present plaintiff, and dismissed his application, holding that the property was the property of the insolvent at the commencement of the insolvency. From that decision the present plaintiff had a right of appeal under S. 46 (3), Provincial Insolvency Act, with the leave either of the District Court or of the High Court.

The plaintiff in this suit did not in fact appeal. He fell back however upon his alternative remedy and instituted this suit in the Court of the Munsif. The Munsif dismissed the suit upon the ground that the order of the District Judge was final unless reversed on appeal. An appeal being brought from this decision, the Subordinate Judge remanded the case to the Munsif's Court to be tried upon the merits. From such order this appeal is brought. The question for our determination is whether under such circumstances, when a claimant who alleges that his property has been wrongfully seized under the jurisdiction conferred upon the Insolvency Courts, and who has two alternative remedies for litigating his grievance, can be allowed, after having adopted one alternative and having failed upon the merits, to begin again and to raise the same issues in another Court. So stated, the proposition would seem to admit of but one answer. The question, which is an important one, is however by no means free from difficulty. The case was well argued, and all the relevant authorities were brought out in review before us.

We have come to the conclusion that the decision of the Munsif was right and that it can be justified on several grounds. In the first place, we think the decision of the Insolvency Court amounts to con-

clusive proof as to the title in respect of the specific things claimed by the applicant, not merely as against him, but absolutely, within the meaning of S. 41, Evidence Act. The Insolvency Court and the Receiver have powers of a very special character given them by the Insolvency Act. An adjudication has the effect of invalidating transactions of a certain character which are otherwise unimpeachable. It curtails and restricts many of the rights and all the ordinary remedies, which persons who have had dealing with the insolvent would otherwise have enjoyed. It compels them to come in and prove their debts or to lose them altogether. It discharges the insolvent from all outstanding liabilities by a division of his property. It imposes penalties upon conduct which in persons who are solvent is not punishable. It vests certain classes of property in the Receiver which do not belong to the debtor at all. By advertisement of notices it calls upon persons who have claims to come in and range themselves amongst other creditors for the decision of their claims and the distribution of their shares. It determines the rights of persons claiming either under or against the debtor absolutely, without reference to the wish or action of the debtor himself, from the date of the adjudication. It extinguishes future liabilities and determines all existing ones. In the case of such applications as the one now under consideration it clearly determines, once for all, so far as relates to any property alleged to be the debtor's, the character of such property so as to bind the creditors and any one claiming through or under the debtor. No doubt it is difficult to see why a person with a good claim to property believed to be the debtor's, who is able to satisfy the Court that he had no knowledge of the proceedings in the Insolvency Court, is to be debarred from asserting his claim in a civil Court and to be bound by a decision of the Insolvency Court given in his absence. On the other hand, it is difficult to see what kind of decision in insolvency jurisdiction was contemplated by S. 41, Evidence Act, if it was not such a decision as that given by the District Judge in the case now before us. In a clear case of fraud relief could always be given in an action for damages.

It was argued before us that the decision of the District Judge was analogous

to a decision in execution proceedings⁹ under O. 21, R. 58, and that being so, the claimant had a right to bring a suit in a civil Court by analogy to O. 21, R. 63. This appears to have been the main ground of the decision of the Subordinate Judge now under appeal. In our opinion this contention is based upon a fallacy. The two things may be analogous, but they are certainly not the same. The application to the Insolvency Court is not a summary proceeding in which a mere right to possession is in question. It is in the nature of a suit, arising out of an executive act, which raises the question of the title to the property of the debtor on the one hand, and of those claiming adversely to him on the other.

In the second place, we think that the action as framed is totally misconceived. It is brought for a declaration of title against a creditor who never claimed to have any title or interest whatever in the property, and also against the debtor, who by becoming insolvent has lost all he ever had. Such a declaration would be a mere *brutum fulmen*. It could not bind the receiver, as he would be no party to it, and even if decreed against a receiver appointed by the Court, we are of opinion that the Insolvency Court would be bound to ignore it. A suit brought for the purpose of obtaining a useless declaration of that kind really amounts to an abuse of the process of the Court. In the third place, we are of opinion that upon general principles of law, apart from S. 11 Civil P. C. a litigant who has voluntarily elected to submit to the decision of one out of two alternative Courts which are open to him, cannot turn round, after an adverse decision, and litigate the same matter in another Court. The principle is the same as that laid down by the Privy Council in *Ram Kirpal v. Rup Kuari* (1), where it was held that on general principles, apart from *res judicata* an interim judgment between the parties as to part of a proceeding is binding upon both in the same proceeding. Upon much the same principle the Court of appeal in England has at least twice decided that a party who like the plaintiff in the present case, has once come in and invited the decision of the Court of Bankruptcy upon the merits of a claim, cannot afterwards turn round and question its jurisdiction. *vide Ex parte Suinbank. In re*

1. (1884) 6 All 269=11 I A 37.

Shanks (2), *Ex parte Butters*, *In re Harrison* (3). When the merits of a dispute have once been finally determined, it is the duty of the Court to make an end of the litigation.

Though it is not necessary for the decision of this case to determine the point, we are further of opinion that an application heard and determined in the way this application was disposed of is in fact a suit. It admittedly lacks some of the attributes of an ordinary suit. But the absence of the ordinary preliminaries required of a suit in a civil Court by the provisions of the Civil Procedure Code is due to the special character of the Insolvency Tribunal in which the present plaintiff elected to litigate his claim, and to the absence of any special rules corresponding to those which are found in the Code. There is no definition of the word "suit," probably because it is not possible to frame one which will satisfactorily survive every test. But on the other hand it is not difficult to decide in the vast majority of cases whether a proceeding is in fact a suit or whether it is merely a summary or subsidiary application. The authorities show that judicial bodies have varied in their methods of treating the question. But every case must turn upon its own circumstances. In the case of *Abdulla Khan v. Kanhaya* (4), decision in an execution proceeding was held to be a bar to a subsequent suit. In the case of *Venkata Chandrappa Nayani-varu v. Venkatrama Reddi* (5), when the proceeding was held not to have been a suit, it was said:

"Suit is a very comprehensive term. It includes any proceeding in a Court of Justice by which a party pursues the remedy which the law gives him. If a right is litigated between parties in a Court of Justice, the proceeding by which the decision of the Court is sought is a suit."

Applying this test, with which we see no reason to quarrel, to the proceeding now in question, we hold that it was a "suit" within the meaning of S. 11 Civil P. C., and that that section affords an answer to the present suit. On these grounds we allow the appeal, and restoring the order of the Munsif, dismiss the action with costs here and below.

V.B./R.K.

Appeal allowed.

2. (1879) 11 On D 525.

3. (1880) 14 Ch D 265.

4. (1912) 91 P R 1912=14 I O 751.

5. (1899) 22 Mad 256.

A. I. R. 1918 Allahabad 349

KNOX, AG. C. J. AND BANERJI, J.
Anandgir—Defendant—Appellant.

v.

Sri Niwas—Plaintiff—Respondent.

Second Appeal No. 1544 of 1916, Decided on 5th June 1918, from a decision of Dist. Judge, Cawnpore.

Agra Tenancy Act (2 of 1901), Ss 158 and 193—Claim for declaration of title to muafi dismissed—On appeal plaintiff held rent-free grantee of occupancy land held by him—Case remanded for determining revenue—No second appeal lies.

Plaintiff brought a suit in the Revenue Court for a declaration that he was the proprietor of a disputed muafi. The suit was dismissed but on appeal the District Judge declared that the plaintiff was a rent free grantee of so much of the land in suit as he was occupancy tenant of, and remanded the suit to the lower Court for determination of the revenue payable by the plaintiff.

Held: that by virtue of S. 193 (a), Agra Tenancy Act, no second appeal lay against the order of the District Judge. [P 350 C 1]

Haribans Sahai for *Nawal Kishore*—for Appellant.

N. C. Vaish—for Respondent.

Judgment.—The plaintiff in the Court of first instance is the respondent here. He brought a suit in the Revenue Court in which he prayed that he might be declared proprietor of a disputed muafi and that costs, etc., might be granted to him. The Court of first instance dismissed his claim altogether. He then went in appeal to the District Judge of Cawnpore, who ordered that the decree of the lower Court, that is to say, the Court of first instance, dated 13th March 1916, be set aside and the appeal be allowed to the extent that the plaintiff was entitled to be declared rent-free grantee of so much of the land in suit as he was then entered in the revenue papers as occupancy tenant of the same. The order however did not stop here. It went on as follows:

"That the suit be remanded to the lower Court for determination of the revenue payable by the plaintiff-appellant."

The defendant has now come to this Court and asks that the decree of the lower appellate Court be set aside and the decree of the Assistant Collector be restored or any other order, that may be deemed fit, may be passed. Various pleas were then set out attacking the judgment of the District Judge. Upon the appeal being called on in this Court for hearing, a preliminary objection was at once raised on behalf of the plaintiff respondent, namely, that no second appeal lies from the order of the District Judge. In sup-

port of the contention stand was taken upon S. 193, Agra Tenancy Act of 1901, and it was contended on the ground set out in Cl. (a), S. 193, that the provisions of the Code of Civil Procedure did not apply to the procedure in suits and other proceedings under the Rent Act. Our attention was called to the case of *Vilayat Husen v. Maharaja Mahendra Chandra Nandy* (1) and *Gulzari Lal v. Latif Husain* (2). The learned vakil for the appellant meets this objection by maintaining that he is not appealing from any order but from a decree, and so seeks to bring the case away from Cl. (a), S. 193. He dwelt a great deal upon the hardship that, if it was held otherwise, he would have no remedy. Be that as it may, we are here not to make law but to expound it as it stands, and it appears to us that the only meaning we can put upon Cl. (a) S. 193, Rent Act is that no appeal lies from an order of this kind. He contended that the decision of the District Judge of Cawnpore was in reality a preliminary decree. We have considered this, but we are unable to agree with it. The Tenancy Act says nothing from first to last about preliminary or final decrees. The result is that the objection prevails and the appeal is dismissed with costs. There is a cross-objection but we have heard nothing about it from the beginning of the case up to this moment. It stands dismissed.

V.B./R.K. *Appeal dismissed.*

1. (1905) 28 All 88.

2. (1916) 38 All 181=35 I C 27

A. I. R. 1918 Allahabad 350

KNOX, J.

Pirthi Singh and others—Defendants
—Appellants.

v.

Laiq Singh and another—Plaintiffs—
Respondents.

Second Appeal No. 1322 of 1916, Decided on 28th February 1918, from decree of Sub-Judge, Banda, D/-22nd July 1916.

Agra Tenancy Act (2 of 1901), S. 197—Subordinate Judge empowered to hear appeals from decisions of Munsif is competent to take action under S. 197—Bengal, N. W. P. and Assam Civil Courts Act (12 of 1887), S. 21.

Where the High Court directs by a notification issued with the previous sanction of the Local Government that all appeals from the decrees or orders of a Munsif shall be preferred to the Court of the Subordinate Judge, the latter Court is hereby empowered to dispose of appeals preferred to it quite as fully and effectively as if it is the court of the District Judge. [P 351 C 1]

Therefore a Subordinate Judge so empowered has power to take action under S. 197, Agra Tenancy Act. [P 351 C 1]

Kailash Nath Katju—for Appellants.
Shiam Krishna Dar—for Respondents.

Judgment.—The sole point raised in this second appeal is that the Subordinate Judge of Banda, not having jurisdiction to hear revenue appeals, had no power to take any action under S. 197, Agra Tenancy Act. The suit to which this second appeal refers was instituted in the Court of the Munsif of Banda. In that Court the defendants raised the question that the suit brought before the Munsif was not cognizable by the Munsif as a civil Court. Their contention was that the suit was one which, if it lay at all lay in the Revenue Court. The Munsif put this in the forefront of his judgment. The fresh issue struck by him was whether this Court had no jurisdiction to try this suit and he decided this issue against the plaintiffs. He held that the suit clearly came within the provisions of Ss. 165 and 167, Agra Tenancy Act, and that the proper forum for that suit was the Revenue Court, and not the civil Court. As a consequence he held that the plaintiffs' suit failed and accordingly dismissed it. The plaintiffs preferred their appeal to the Court of the Sessions and Subordinate Judge at Banda. Their contention was that the civil Court had jurisdiction to try the suit and the Revenue Court could not decide it. The learned Subordinate Judge when he proceeded to try the appeal was met by a request from the vakil for the appellants that he should take action under S. 197, Agra Tenancy Act. He held that he could act under that section, allowed the appeal and decreed the plaintiffs' claim. The defendants have come here in second appeal and raised the plea set out in the beginning of this judgment. The learned vakil for the appellants advanced the argument that this was a case which fell within the provisions of S. 21, Act. 12 of 1887. Cl. 4 provides that the High Court may, with the previous sanction of the Local Government, direct by notification in the Official Gazette that appeals laying to the District Judge under sub-S. (2) from all or any of the decrees or orders of any Munsif shall be preferred to the Court of such Subordinate Judge as may be mentioned in the notification. While this provision enabled appeals from decrees or orders of Munsif to be pre-

ferred, no provision whatever was made for appeals from a Revenue Court and he contended that S. 196 never intended that a revenue suit should go in appeal to any Court other than the District Judge or the High Court, as the case might be. The question thus raised is an interesting question but so far as this case is concerned and so far as I am concerned, the contention appears to me to be concluded by a ruling of a Division Bench of this Court reported as *Sheo Harakh v. Ram Chander* (1). The appeal before me is an appeal which arises out of a decree passed by the Munsif of Banda. Under Notification No. 1708, dated 25th April 1913 to be found in the U. P. Gazette for 26th April 1913, part 2, p. 726, a notification was issued with the previous sanction of the Local Government, and in that notification this High Court directed that all appeals from the decrees or orders of the Munsif of Banda shall be preferred to the Court of the Sessions and Subordinate Judge at Banda. This latter Court was thereby empowered to dispose of appeals preferred to it quite as fully and effectively as if it had been the Court of the District Judge of Banda; indeed by the virtue of that notification it became for this purpose the appellate Court from the Court of the Munsif at Banda. This particular business, hitherto confined to the District Judge of Banda, had been transferred to the Court of the Sessions and Subordinate Judge at Banda and under S. 150, Civil P. C., that Court thereupon had the same power and could perform the same duties as the Court of the District Judge of Banda. The appeal fails and is dismissed with costs.

V.B./R.K.

Appeal dismissed.

1. A I R 1915 All 18=87 All 76=26 I O 739.

A. I. R. 1918 Allahabad 351

PIGGOTT AND WALSH, JJ.

Emperor

v.

Raghunath—Opposite party.

Criminal Revn. No. 667 of 1917, Decided on 10th November 1917, from order of Sub-Judge, Kamaun, D/- 16th June 1916.

(a) Forest Act (1878), S. 25 (f)—Person felling trees is guilty of as many offences as number of trees felled—Accused charged for felling 69 trees convicted on only three separate charges—Trial is bad in law—Accused being sufficiently punished irregularity held

to be covered by S. 537, Criminal P. C. (1898), Ss. 234 and 537.

A person felling a number of trees in a forest is guilty of as many offences under S. 25 (f), as the number of the trees felled by him.

[P 352 C 1]

Accused was charged under S. 25 (f), Forest Act, with felling 69 trees in a forest, and was convicted on three separate charges :

Held : (1) that the accused was guilty of 69 offences.

[P 352 C 1]

(2) That the trial of the accused on three charges for 69 offences was bad in law.

[P 352 C 1]

(3) But that the accused having been sufficiently punished, the irregularity was covered by S. 537 and a retrial was not necessary.

[P 352 C 1]

(b) Criminal P. C. (1898), S. 234—Accused committing numerous offences of same kind—Small number of typical cases should be selected and charge framed accordingly—If sentence passed is sufficient remaining charges need not be proceeded with—If accused is acquitted of charges, prosecution can proceed with remaining charges.

The ordinary course for the prosecution in cases in which an accused has committed numerous offences of the same kind is to select a small number of typical cases, to frame their charges accordingly and to prosecute them before a Magistrate. If the result of these proceedings is to penalize the accused and the sentence inflicted is considered sufficient to meet the ends of justice, the remaining charges which might still be brought need not be proceeded with. If, on the other hand, through some unforeseen accident or miscarriage at the trial the accused is acquitted of those charges, then it is open to the prosecution to proceed with the remaining charges.

[P 352 C 2]

R. Malcomson—for the Crown.

M. L. Agarwala—for the Applicant.

Walsh, J.—This case has been brought before this Court in revision and referred to a Bench of two Judges by our brother Banerji under the following circumstances. The accused has been convicted of cutting down 69 trees contrary to law and no doubt, although he set up a bona fide misunderstanding it is a bad case. The Magistrate fined him with considerable severity, namely, Rs. 1,500. He was charged under three separate charges in respect of the trees felled in three separate toks, the total number of trees being in all 69. He appealed to the Sessions Judge and amongst other points took the point that the charge ought not to have been split up into three but that the offence was one, the cutting having been a breach of the permission to cut. The Sessions Judge rejected that view and we agree with him. He further took the view that the offences committed were in reality 69 offences and we agree with him as to that. The

section is quite clear. Any person who fells any tree is liable to the specified penalties, which include a fine of Rs. 500. It is quite clear that the accused might have been convicted and fined for 69 trees. It is suggested before us that by reason of certain language in S. 29 of the Act, in question (7 of 1878) the area should be regarded and not the particular trees. There is nothing in the Act to support this contention which is contrary to the ordinary interpretation of Statutes. The Sessions Judge taking this view with which we agree pointed out that with regard to the framing of charges, the law is quite clear and that only three offences could be charged together and that from that point of view the trial and conviction were contrary to law. Thereupon the appellant's pleader pointed out that if the case were sent back the accused might be subjected to 23 separate trials, for the 69 trees. The Sessions Judge however gave no effect to this protest but set the conviction aside and sent the whole case back.

The matter has come before us in revision and we think it our duty to take a broad view of the situation. No public purpose, or ends of justice, will be served by disturbing the conviction or by sending the case back to be tried all over again. The accused has been heavily fined and no doubt rightly heavily fined. It is very unlikely that if any further proceedings were taken in the original Court any other result in the total would be reached; there is therefore no useful purpose to be gained by taking the course which the Sessions Judge has taken. Although the Privy Council, as was pointed out in argument by my brother Piggott, has enforced the necessity of framing charges strictly according to law, the point in this case was taken against the appellant on his own appeal, which is another matter altogether, and it is a point which is clearly covered by the provisions of S. 537, although we might interfere in revision as against the accused in the way the Sessions Judge has done, if there had been any kind of miscarriage of justice. While we agree with the principles laid down as to the construction of the Act and the framing of charges in the judgment of the Sessions Judge, we think that the ends of justice will be met by restoring the conviction. We would merely add that the ordinary

course for the prosecution in such cases is to select a small number of typical cases (not a large proportion where the number is 69) and to frame their charges accordingly and to prosecute them before the Magistrate. If the result of those proceedings is to penalize the accused, and the sentence or fine inflicted is considered sufficient to meet the ends of justice there is an end of the matter, and the remaining charges which might still be brought need not be proceeded with. If on the other hand, through some unforeseen accident or miscarriage at the trial the accused is acquitted of those charges, then it is open to the prosecution to proceed with the remaining charges. In this way all the difficulties suggested by the Sessions Judge can be met. The order of the Court is that the application be allowed and the original conviction and penalty of the Magistrate be restored.

V.B./R.K. *Application allowed.*

A. I. R. 1918 Allahabad 352

TUDBALL, J.

Abhilakh Dhelphora—Defendant—Appellant.

v.

Liladhar Dhalphora—Plaintiff—Respondent.

Second Appeal No. 1190 of 1916, Decided on 28th January 1918, from decree of Dist. Judge, Gorakhpur, dated 14th April 1916.

Limitation Act (1908), Art. 134—Mortgage of occupancy holding to zamindar—Transfer of holding by zamindar—Suit for redemption—Limitation of 12 years applied from date of transfer.

An occupancy tenant gave a usufructuary mortgage of his holding to the zamindar, who sold his proprietary rights including the holding to the defendant. The plaintiff brought a suit for redemption and the defendant contended that the plaintiff being an occupancy tenant and having been dispossessed for more than six years from his holding, his suit for possession was barred by time:

Held: that the suit was not one to recover possession of a holding from which the plaintiff had been unlawfully dispossessed, but was a suit by a mortgagor to recover possession of the mortgaged property from his mortgagee and certain persons to whom the mortgagee had transferred the property and as the plaintiff had not been unlawfully dispossessed from the holding, the limitation of 12 years applied from the date of transfer to defendant under Art. 134. [P 353 C 1, 2]

Ishwar Saran—for Appellant.

Harnandan Prasad—for Respondent.

Judgment.—The facts of this case are clearly set out in the judgment of the Dis-

trict Judge, dated 9th September 1915. by which he remanded an issue to the Court of first instance. Briefly put, the case is as follows. An occupancy tenant in the year 1900 gave a usufructuary mortgage of his holding to the zamindar. About a year before this suit was brought the zamindar sold his proprietary rights to Abilakh and Lochan. He also relinquished his *sir* and khudkasht lands in favour of his vendees. Among such lands he transferred to the vendees the property which is now in suit. The mortgagor deposited the money due under the mortgage under S. 83, T. P. Act, making Sheo Narain, Lochan and Abilakh all parties to his application. This was on 17th April 1914. As the money was not taken, he sued on 21st July 1914 for redemption of the mortgage and for damages. The Court below set aside the decree of the Court of first instance and decreed the plaintiff's suit, awarding the plaintiff mesne profits with effect from the date of the institution of the suit. It was pleaded on behalf of the appellant that the suit is time-barred because the plaintiff is an occupancy tenant who has been dispossessed for more than six years and his suit for possession was barred by time. Attention is called to the ruling of *Pahalwan Singh v Satrupa Kuar* (1). This decision does not assist me in the present case at all. That was a suit by a mortgagee of an occupancy holding to recover possession of that holding when his mortgagor, the occupancy tenant, had been dispossessed by the zamindar. There has been no unlawful dispossession in the present case. The mortgagee has made a transfer to Abilakh and Lochan of his zamindari rights. He voluntarily and willingly gave up these lands to them. They did not unlawfully dispossess him in any way. As against them Sheo Narain could not possibly recover possession, they being the transferees of his rights. There can be no doubt as to the mortgage and as to the transfer by Sheo Narain to Abilakh. The tenant, that is, the respondent to this appeal, could not possibly recover possession without paying his money and he can only recover possession by a redemption suit. The suit is not a suit by a tenant to recover possession of a holding from which he has been unlawfully dispossessed. It is a suit by mortgagor to recover possession from his mortgagee and

1. (1905) 2 A. L. J. 471.

certain persons to whom the mortgagee has transferred. The limitation of 12 years applies from the date of transfer to Abilakh and Lochan. (Article 134).

The next point which has been pressed is that the appellant is not liable for mesne profits which have been awarded by the Court below as damages. The appellant has been in possession with effect at least from the date of suit, knowing very well that his right to retain possession was contested and with all the facts of the case before him. The profits that were in his pocket belonged *prima facie* to the plaintiff who had deposited the money under S. 83, T. P. Act. If the appellant has any remedy against Sheo Narain it is open to him to take it. I see no justice in exempting him from the decree and allowing him to keep in his pocket that which belongs to the plaintiff. There is no force in this appeal. It is therefore dismissed with costs.

V.B./R.K.

Appeal dismissed.

A. I. R. 1918 Allahabad 353

KNOX, J.

Ashbey Clarke Harris—Appellant.

v.

Emperor—Opposite party.

Criminal Appeal No. 834 of 1917, Decided on 22nd November 1917, from order of City Magistrate, Lucknow. D/- 26th September 1917.

(a) Penal Code (1860), S. 403—Letter read thrown by complainant—Accused picking it up and attaching it to affidavit in a case of judicial separation between him and his wife—Accused is not guilty of misappropriation.

Accused and complainant were sitting at a table when a letter was delivered to the latter, who read it and threw it on the table. Accused picked up the letter and subsequently attached it to an affidavit filed by him in a case of judicial separation between the complainant and his wife, in order, as he said, to "strengthen the wife's case and to improve my position."

Held: that the accused could not be convicted of criminal misappropriation as there had been no dishonest misappropriation or conversion to his own use of the letter. [P 354 C 2]

(b) Penal Code (1860), S. 22—Letter thrown away by owner and picked up and carried away by another whether "property"—*Quaere*.

Whether an envelope thrown by the owner of the envelope into a waste paper basket and picked up and carried away by another person is "property" within the meaning of the Penal Code *Quaere*. [P 354 C 2]

Satya Chandra Mukerji—for Appellant.

J. M. Banerji and Lal Mohan Das
nerji—for the Crown.

Advocate High Court

Judgment.—Harris has been convicted under S. 403, I. P. C., of criminal misappropriation of property. The judgment under which he has been convicted says that the property misappropriated is a letter which is on the record and which is marked Ex. B. This is the only property regarding which any decision is to be arrived at in this appeal. Ex. B is a letter which undoubtedly does no credit to the person who wrote it and would have been far better unwritten. But with that I am not concerned in the present appeal. I have only to decide the questions: (1) whether the said letter is property within the meaning of the Indian Penal Code, (2) if it is property, whether it has been criminally misappropriated by Harris. The letter is admitted to be a letter addressed to Williamson, the complainant in the present case. It is also admitted that this letter first came into evidence, so far as this case is concerned, in a room occupied by Harris within the house in which for the time being Williamson was residing and Harris residing with Williamson as a guest. Harris was for the time being occupying the particular room. A postman is said to have brought the letter, Ex. B, into this room. Williamson says that on receipt of the letter he placed it in a drawer of his writing table. The learned Magistrate has however thrown such doubt upon the evidence given by Williamson in the case that it is impossible to act upon it in a criminal case. The prosecution were therefore compelled to fall back upon the statement made by Harris himself regarding this matter and to contend that according to that statement, the letter was Williamson's property, was handed over to Williamson, who threw it on a table at which he and Harris were standing or seated, and next appeared in a Court at Bareilly in the pocket of Harris. Harris attempted to have the letter filed in a case then pending between Mrs. Williamson and Williamson for judicial separation.

The letter was handed by Harris to the Judge who however refused to receive it and returned it to Harris. This it is argued amounted to a retention of property, the property of Williamson, and that retention was done with the intention of causing wrongful gain or wrongful loss.

I have considerable doubts myself as to whether the letter under the circumstances stated by Harris in his statement was property within the meaning of the Indian Penal Code. It would be difficult to hold that an envelope thrown by the owner of the envelope into a waste paper basket and picked up or carried away by another person would be property within the meaning of that Code. To throw more light on this it is well to look to the actual terms used by Harris in this connexion. If Harris is to be convicted on his own statement, that statement must be taken as a whole and with its natural meaning. Harris says that Williamson read the letter and placed it on Harris' table, that Williamson was drunk at the time and after an interval left the letter on the table and that Harris felt justified in his own interest as also in the interest of Mrs. Williamson to attach it to his (Harris') affidavit so as to strengthen her case and improve his own position, whatever these last words may amount to. I have already said that I have considerable doubt as to whether a letter of this kind and under these circumstances comes within the meaning of "moveable property" as used in the Indian Penal Code. Assuming for the moment that it does, the next point which is to be considered is whether the evidence has established that Harris dishonestly misappropriated or converted to his own use this letter. Proof of dishonest misappropriation or conversion to the use of the accused is as essential an ingredient as any other ingredient for an offence under S. 403, I. P. C. I have heard Harris who conducted his own case and also the learned Government Pleader. I have also considered the evidence on the record. I have not to consider whether Harris converted the letter to the use of Mrs. Williamson. It must be a conversion to his own use, and the only evidence which bears on this rests upon the words used by Harris:

"I attached the letter to my affidavit so as to improve my own position." Had this been explained by Harris elsewhere in his statement, or had there been any evidence on the record explaining these words, the matter might have been different. I hold that these words standing by themselves are not sufficient to establish a conversion of the letter to the use of Harris.

It may be necessary to add something as regards dishonest misappropriation. With reference to this it is necessary to consider whether it has been established that wrongful gain or wrongful loss was intended to be caused. With regard to wrongful gain, it appears to me from the definition given in S. 23, I. P. C., that "gain by unlawful means" is gain to Harris and that we have not to consider gain to Mrs. Williamson or to any one else. I am unable to hold that when Harris picked up the letter, he had any intention to cause wrongful gain within the meaning of S. 23, I. P. C., and I think it would be stretching the definition of wrongful loss if I were to hold that Harris by picking up this letter and attaching it to his affidavit, which according to him he was then preparing and by keeping it afterwards until he produced it in a Court at Bareilly was causing wrongful loss within the meaning of S. 23. I hold it to be no part of my judgment that I should go, as the Court below did, into the moral aspect of this case. I have only to consider whether the offence of which Harris has been found guilty is established against him by the evidence. Holding that it is not, I set aside the conviction and sentence passed by the City Magistrate of Lucknow, and direct that the fine or any part thereof, if realized, be returned to Harris.

V.B./R.K. *Appeal allowed.*

A. I. R. 1918 Allahabad 355 (1)

BANERJI, J.

Sheobans Singh and others—Applicants.

v.

Emperor—Opposite Party.

Criminal Revn. No. 700 of 1917, Decided on 25th September 1917, from order of Seps. Judge, Mainpuri.

Penal Code, (1860), Ss. 147 and 325—Conviction under both sections—Appellate Court disbelieving whole evidence cannot confirm conviction under one section and set aside that under other—Criminal trial, Evidence—Criminal P. C. S. 423.

Accused were convicted by a Magistrate under Ss. 147 and 325, I. P. C. On appeal the Sessions Judge, disbelieving the whole of the prosecution evidence, set aside the conviction under S. 147 but confirmed the conviction under S. 325;

Held: that on the view taken by the Sessions Judge of the evidence the conviction under S. 325 was illegal. [P 855 C 2]

Satya Chandra Mukerji—for Applicants.

R. Malcomson—for the Crown.

Judgment.—The applicants along with several others were convicted by a Magistrate under Ss. 147 and 325 I. P. C. On appeal the learned Sessions Judge set aside the conviction under S. 147 and in the case of the applicants confirmed the conviction under S. 325. The learned Judge in the course of his judgment says, "there is no evidence worthy of credit on either side." Further down he repeats that "there is no reliable evidence that there was a riot." He thus discards the whole of the evidence adduced on behalf of the prosecution and yet he holds the applicants to be guilty of having caused grievous hurt to Ajudhi. No doubt Ajudhi received serious injuries and so did the applicants, but from the fact of there being injuries on the person of Ajudhi it did not follow that those injuries were inflicted by the three applicants. As the learned Judge disbelieves the whole of the evidence for the prosecution and he does not say that he believes any portion of it, the applicants could not be convicted in the absence of any evidence. It is probable that they attacked Ajudhi and inflicted wounds on him, but the accused could not be convicted merely because there is strong suspicion that they did inflict those injuries.

It would be unsafe to convict them on evidence which, according to the learned Judge himself, is wholly unworthy of credit. I therefore allow the application and setting aside the conviction of the applicants and the sentence passed on them, acquit them of the offence of which they have been convicted. The bail furnished by them is discharged.

V.B./R.K. *Application allowed.*

A. I. R. 1918 Allahabad 355 (2)

RYVES, J.

Sukh Lal—Defendant—Applicant.

v.

Nannoon Prasad—Plaintiff—Opposite Party.

Civil Revn. No. 77 of 1918, Decided on 26th June 1918, from the order of Small Cause Court Judge, Agra, D/- 6th March 1918.

(a) Provincial Small Cause Courts Act (1887), Art. 31—Suit for share of rent realised by co-owner is suit for money had and received—Small Cause Court is competent to try.

A suit to recover half the rent of a house by a co-owner against another co-owner and the tenant where the whole rent has been realized by

the co-owner, is a suit for money had and received and not a suit for money wrongfully received by the co-owner and is not excluded from the cognizance of a Court of Small Causes. [P 356 C 2]

(b) Jurisdiction — Waiver — High Court has power of interference.

It is not open to the parties to waive a question of jurisdiction, but the High Court has a discretion to interfere or not to interfere in a case in which jurisdiction has been waived. [P 356 C 2]

Narain Prasad Asthana—for Applicant.

Shiam Krishna Dar — for Opposite Party.

Judgment.— This application arises out of a suit brought by a nephew against his uncle and a tenant. It appears that a house which jointly belonged to the nephew and uncle had for many years been rented by defendant 2 and the whole rent used to be collected by the uncle. No doubt the nephew was entitled to a half share. This suit was brought to recover Rs. 180, being half of Rs. 360 which the uncle had been paid by the tenant. The suit was filed in a Court of Small Causes. Not only was no objection taken to the jurisdiction of that Court, but in para. 8 of the written statement the uncle specifically stated that he raised no objection to the Court trying the suit. Of course it is not open to parties to waive a question of jurisdiction, but for reasons to be stated later, I think this matter is of some importance. The Court, from the judgment which it has recorded, tried the case apparently very fully, and came to what seems to me a very just decision. Having lost the suit in that Court, the uncle applies to this Court for revision and for the first time raises the objection that the Court below had no jurisdiction to try the suit and he relies on Art. 31 of the Schedule to the Act (9 of 1887). It is only the second part of that Article which could apply, that is to say:

"a suit for the profits of immovable property belonging to the plaintiff which have been wrongfully received by the defendant"

is barred from the cognizance of a Court of Small Causes. Reliance has been placed on *Rameshar Singh v. Durga Das* (1), *Uzir v. Hari Charan Pal* (2) and *Nand Rani v. Swashwaneswar Mukerji* (3). It seems to me that it is by no means clear that this case comes within the scope of those rulings.

It appears in this particular case that the rent had been paid for many years

by the tenant to the uncle. I, therefore, do not see how it can be said that the uncle had wrongfully received the rent, the subject matter of this suit. It seems to me to be an ordinary suit for money had and received. In any case, I feel that substantial justice has been done and the only result of this application would be further litigation, and that between an uncle and a nephew, and should hesitate to reopen the matter unless I am forced to. There is the authority of this Court in *Ram Lal v. Kabul Singh* (4), and I would refer also to the cases referred in *Jadunandan Sahay v. Jung Bahadur Sahay* (5) and *National Insurance and Banking Co. v. Biswambar Choudhary* (6) which give me a discretion. As I have already stated, I doubt as to whether Art. 31 strictly applies, and having also, I think a discretion in the matter, I decline to interfere. The result is that the application is rejected with costs.

V.B./R.K. *Application dismissed.*

4. (1902) 25 All 135.

5. (1917) 37 I C 991.

6. (1915) 29 I C 566.

A. I. R. 1918 Allahabad 356

PIGGOTT AND WALSH, JJ.

Umrao Singh and another—Plaintiffs—Appellants.

v.

Umrao Singh—Defendant — Respondent.

First Appeal No. 397 of 1915, Decided on 12th April 1918, from a decree of Addl. Sub-Judge, Meerut.

Civil P. C. (1908), O. 23, R. 1 — Suit for partition—Plaintiff asking house to be sold—Defendant offering to purchase—Price fixed — Application for withdrawal of suit held rightly dismissed as too late—Partition Act (4 of 1893), Ss. 2 and 3.

In a suit for partition of a house the plaintiff stated that the partition of the house by metes and bounds would spoil the house altogether and asked the Court under S. 2, Partition Act, to order a sale of the house. The defendant claimed to exercise his right under S. 3 of the Act to buy the plaintiff's share at a valuation to be fixed by the Court. The Court proceeded to cause a valuation of the house to be made and after it had fixed the valuation of the plaintiff's share the latter filed an application for leave to withdraw the suit with liberty to bring a fresh suit which was dismissed:

Held, that the application having been made at a time when matters had reached a stage at which the defendant was entitled to the benefit of the claim which he had put forward under S. 3 the Court exercised a sound discretion in refusing to allow the application. [P 357 C 2]

1. (1901) 23 All 437.

2. (1917) 37 I C 671.

3. (1910) 8 I C 270.

Surendra Nath Sen and B. E. O'Connor
—for Appellants.

Tej Bahadur Sapru and Girdhari Lal Agarwala—for Respondent.

Judgment.—The appellants in this Court were the plaintiffs in a suit for partition. They owned between them 8-19ths of a certain house. The defendant owned the remaining 1-19th share. In their plaint at para. 4 the plaintiffs stated that, regard being had to its accommodation the partition of the house in suit would spoil the house altogether so that it would not "at all remain comfortable for residential purposes." Hence the plaintiffs asked the Court under S. 2, Partition Act (4 of 1893), to order a sale of the house. In reply the defendant raised alternative pleas. In the first place he alleged that a partition of the house by metes and bounds could be effected to the mutual convenience of the parties provided it were effected in a certain way. In the alternative he pleaded that if the Court held that the house could not reasonably or conveniently be partitioned and was prepared to accept the plaintiffs' prayer for an auction-sale, then the defendant claimed to exercise his right under S. 3 of the same Act to buy the plaintiffs' share at a valuation. At a later stage it is quite clear that the defendant was prepared to withdraw, and did withdraw his objection to the plaintiffs' allegation that the house could not conveniently be partitioned. He elected to abide by his alternative claim to purchase at a valuation to be fixed by the Court. The Court proceeded accordingly to cause a valuation to be made, obtained a report from Commissioners, heard objections to that report and fixed the value of the plaintiffs' share at Rs. 6,000. It has framed its decree accordingly permitting the defendant to purchase at this price. In the memorandum of appeal before us it is contended firstly that the Court below has misinterpreted Ss. 2 and 3, Partition Act. We think that on the contrary the Court below has properly applied those sections according to their plain meaning. The suggestion that the Court could not legally take the action which it did without first taking evidence and recording an affirmative finding to the effect that the house could not conveniently be partitioned and that its sale by auction would be more beneficial to the share-holders comes with an ill-

grace from the plaintiffs-appellants. They are as a matter of fact trying to make it a grievance that the Court accepted their own allegations of fact to be correct. Moreover as we have already pointed out the defendant in a subsequent pleading had virtually accepted the same position. Finally it has been urged upon us that at a later stage of the trial when the plaintiffs discovered what the result of the proceedings was likely to be, they asked permission of the Court to withdraw from their suit with leave to bring a fresh suit and that this request was refused. Under the circumstances the Court below exercised a sound discretion in refusing to allow this application. Matters had reached a stage at which the defendant was entitled to the benefit of the claim which he had put forward under S. 3, Partition Act, and in any case the application for withdrawal filed by the plaintiffs does not satisfy the conditions laid down by O. 23, Civil P. C. In the memorandum of appeal before us there is no definite plea that the finding of the Court below, fixing the value of the plaintiffs' share at Rs. 6,000 is incorrect. Even if we can understand the paragraph of the memorandum of appeal before us as suggesting such a plea it seems to us that the finding of the Court below is in accordance with the weight of the evidence. The result is that this appeal fails and we dismiss it with costs.

V.B./R.K.

Appeal dismissed.

A. I. R. 1918 Allahabad 357

KNOX, J.

Gobardhan—Defendant—Appellant.

v.

Padam Singh—Plaintiff—Respondent.

Second Appeal No. 1250 of 1916, Decided on 28th February 1918, from decree of Dist. Judge, Agra.

(a) *Agra Tenancy Act* (2 of 1901), S. 194—Private partition.

A private partition of a vague nature is not enough to take a case out of S. 194. [P 353 C 2]

(b) *Agra Tenancy Act* (2 of 1901), S. 194—Suit for rent by cosharer—Proof of special contract is necessary to entitle to sue.

In order to entitle a cosharer to sue separately for rent there must be a special contract clearly setting out the opposition to law as stated in S. 194 (1). [P 359 C 1]

Jogendra Nath Mukerji—for Appellant.

Durga Charan Banerji—for Respondent.

Judgment.—This second appeal arises out of a suit brought by one Padam Singh against one Gobardhan. Padam Singh sued to recover Rs. 224-14-0 on account of the arrears of rent said to be due from one Gobardhan. In the plaint he alleges that he and certain other persons held khudkasht land and that the khudkasht land in dispute has fallen to his lot under private partition and that he alone receives rent from the defendant. The defendant starts in his written statement by refusing to admit every thing stated in the plaint; then goes on to say that he is the sub-tenant from all the cosharers in whose name the khudkasht is recorded in the papers of the patwari, that he has always paid rent to Ram Chander and did pay the rent of the years in dispute to the said Ram Chander and that nothing is due from him. There is also a question as to the amount of rent due. The Court of first instance held that Padam Singh was not entitled to claim the whole of the rent but only entitled to collect Rs. 39 and gave him a decree for Rs. 80 out of the total amount claimed. Both parties, I am told, went in appeal to the District Judge of Agra. The appeal before me arises from the appeal presented in that Court by Thakur Padam Singh. In appeal it was contended that the lower Court has erred in holding that Ram Chander has been collecting rent of Rs. 35 from the defendant or was entitled to collect it, that it has been sufficiently proved that the plaintiff is entitled to collect the rent in dispute from the defendant and that the judgment of the lower Court is against the weight of evidence and probabilities of the case.

The District Judge started by setting out as his first issue, whether the plaintiff Thakur Padam Singh is entitled to sue the defendant for rent without joining the other cosharers. He says that in the present case the present representatives of the other two sons of Gobind Singh, with the exception of Ram Chander have appeared as witnesses and have deposed that a private partition has taken place and that in accordance with that private partition the land held by the defendant Gobardhan has come into Thakur Padam Singh's share. He further points out that Har Chand and Ramji Lal have appeared and given evidence relating to the partition and have admitted Padam

Singh's separate title to the lands held by Gobardhan. Upon this he holds that Thakur Padam Singh is alone entitled to collect the rent from the defendant Gobardhan. He therefore modifies the decree of the Court below and gives the plaintiff a decree for the rent of the whole holding. The defendant comes here in appeal and puts forward a finding and decree of a Revenue Court in a previous suit between the same parties, the effect of which is that the plaintiff is not entitled to collect the rent of the present holding and urges that that operates as *res judicata*. He further contends that under S. 194, Agra Tenancy Act, the suit is barred. I take this latter plea first. S. 194 lays down that where there are two or more cosharers in any right, title or interest, all things required or permitted to be done by the possessor of the same shall be done 'by them conjointly, unless they have appointed an agent to act on behalf of them all. The question of agency does not arise at all. According to the plaint, the plaintiff Thakur Ram Chander and others held khudkasht lands and there are therefore two or more cosharers in the right, title or interest relating to this land. An attempt is made to take the case out of S. 194, Cl. (1), because of an alleged private partition.

All that has been stated in the judgment about the private partition is that the land held by the defendant Gobardhan has come into Thakur Padam Singh's share. This may or may not be the case; but a private partition of this vague nature is certainly not enough to take the case out of S. 194, Act 2 of 1901. The plaintiff appears to have himself felt this difficulty, for he attempts to set up that he is entitled to receive separately his share of the rent payable by the defendant. This is an exceptional state of things, against probabilities, and a state of things which requires strong and clear evidence to support it. No local custom to this effect has been advanced and we have to fall back upon a special contract, if any, by which the plaintiff is entitled to recover separately his share of rent payable by the defendant. So far as the finding of the lower appellate Court goes the special contract is not mentioned. Certain evidence has been set out in the judgment, which evidence I am told admits Padam Singh's separate title to the lands held by Gobardhan but there the

evidence stops short. It might be the case, as I have already said, that Padam Singh in this private partition was under an agreement entitled to the lands held by Gobardhan, but that will not entitle him to receive separately his share of rent payable by Gobardhan. There must be a special contract clearly setting out this opposition to law as stated in S. 194, Cl. (1), Agra Tenancy Act. The appeal succeeds, the decrees of both the Courts below are set aside and the plaintiff's claim dismissed with costs in all Courts.

V.B./R.K.

*Appeal allowed.***A. I. R. 1918 Allahabad 359**

PIGGOTT AND WALSH, JJ.

Radhey Lal—Defendant—Appellant.

v.

Bhawani Ram and another—Plaintiffs—Respondents.

Second Appeal No. 147 of 1916, Decided on 5th November 1917, from decision of Sub-Judge, Muttra, D/- 15th December 1915.

Hindu Law—Succession—Widow—Widow living peacefully with husband till his death, obtaining possession of estate—Adulterous act committed many years prior to her husband's death cannot divest her of estate.

A Hindu widow who has been living in peace and harmony with her husband at the time of his death and has obtained possession of his estate, is not to be divested of the estate on the mere ground that an adulterous act was committed by her many years prior to her husband's death. [P 362 C 1]

Narain Prasad Asthana—for Appellant.*S. N. Sen*—for Respondents.

Judgment.—This is a second appeal arising out of the following state of facts. One Balmakund died as a separated Hindu. He was childless and left him surviving a widow, Mt. Bidiya. The latter performed the obsequies of her deceased husband and entered into possession of his property, including a certain house. She subsequently sold this house to one Radhey Lal. Thereupon the present suit was brought by Bhawani Ram, brother of Balmakund impleading Mt. Bidiya and Radhey Lal as defendants. Relief was sought in the alternative, either by immediate possession over the house in question, or by way of a declaration that the alienation made would not bind the plaintiff after the death of Mt. Bidiya. The reason why the first relief was claimed, was that the plaintiff alleged that Mt. Bidiya, having been unchaste

during the lifetime of her husband, was not his heir at all under the Hindu law and was disentitled to succeed to any of his property, even with the limited estate of a Hindu widow. With regard to this allegation of chastity we have concurrent findings by the Courts below and those findings are binding upon us in second appeal. Mt. Bidiya was in fact guilty of unchastity during the lifetime of her husband. She left her home with a paramour some eight years before her husband's death; but her husband condoned the offence, forgave his erring wife and took her back into his house, where she lived with him as his wife during the closing years of his life and was so living at the time of his death. A point has been made in argument before us that there is no evidence of the performance on the part of Mt. Bidiya of any of the expiratory ceremonies prescribed by Hindu Law.

It is true that the record is silent on this point; but, on the other hand, there is no allegation that Mt. Bidiya was out-casted in consequence of her conduct or that any social penalty was inflicted on Balmakund by the members of his brotherhood on account of his having re-admitted the erring woman to the privileges of wifehood. On these facts the Court of first instance held that Mt. Bidiya had succeeded to the estate of Balmakund with the ordinary rights of a Hindu widow. The learned Munsif went into the question of consideration for the sale deed in suit. The total consideration was Rupees 500, and the finding is that out of this Rs. 200 was spent on the due performance of ceremonies and observances in connexion with the funeral rites of the deceased. To this extent therefore the alienation was justified by necessity. The learned Munsif accordingly gave the plaintiff a declaration to the effect that the sale in favour of Radhey Lal was not binding upon him after the death of the widow except to the extent of a sum of Rs. 200. There were appeals by both parties, and that is the reason why we have two appeals now before us although in this Court both of them are preferred by the defendant, Radhey Lal. The learned Subordinate Judge has not dissented from the Court of first instance on any finding of fact, but he has taken a different view of the law applicable to those facts. He holds that the proved unchastity of

Mt. Bidiya disentitled her to inherit the estate of her deceased husband and that this disqualification is in no way affected by the husband's condonation or forgiveness. In the appeals now before us Radhey Lal only asks for the restoration of the decree passed by the Court of first instance, and we have nothing to consider except the question of law on which the two Courts below have differed.

There is no clear authority of this Court on the point, but there is a reported decision of the Bombay High Court which seems to go the whole length in favour of the appellant. This is the case of *Gangadhar v. Yellu Viraswami Shiravale* (1). It has been contended before us on behalf of the respondents that the facts of this case are distinguishable from those now before us and a similar contention evidently found favour in the lower appellate Court. The suggestion is that the two cases are to be distinguished on two grounds: (1) because in the Bombay case the allegation of the plaintiff was that the unchastity there alleged had been committed during the husband's lifetime at his express desire; (2) that the alienation in the present case is being contested, not by a stranger, but by a brother of the deceased.

There is something to be said in support of both these contentions, the report of the Bombay case being very brief and not making it clear beyond dispute what was the precise state of facts on which the Court proceeded. It seems clear, however that the argument of the learned Judges, in which reference is made to a charge of unchastity brought forward by mere outsiders, cannot be regarded as affecting the decision in the sense contended for on behalf of the plaintiff-respondent in the present case. In the first place it is by no means clear that the expression "mere outsiders" as used in the judgment of Beaman, J., means anything more than persons other than the husband or the wife. Apart from this, the learned Judge evidently conceived himself to be laying down a general principle of law which, unless affirmed, would leave it open to any person interested in the matter to deny on some future occasion the rights of a widow who had peacefully succeeded to the possession of her late husband's property, by raking up some ancient scandal long antecedent to the

date on which the inheritance opened. As regards the general question of condonation by the husband, it seems clear that the Bombay decision does not mean to lay down any distinction between an act of adultery committed with the previous knowledge and consent of the husband and a similar act committed behind his back, but covered by his condonation and forgiveness. Nor does it seem possible to lay down any valid distinction upon these lines. There is one other reported authority on the point which deserves careful consideration, and that is to be found in *Matunjinee Dabee v. Joykalle Dabee* (2). The actual point for decision in that case was the much controverted question, set at rest later on by the decision of their Lordships of the Privy Council in *Moniram Kolita v. Keri Kolitani* (3), as to the consequences of unchastity on the part of a Hindu widow after the estate had opened in her favour. The learned Judges however found it necessary to enter into an elaborate examination of the entire question and the result is that we find propositions of law laid down which have a direct bearing on the question now before us. Markby, J., quotes an older case of the same Court as authority for the proposition that even adultery in the husband's lifetime is not in itself necessarily sufficient to disentitle the wife to inherit. He goes on to explain his meaning by saying that in his opinion it is not the immoral act alone which in any case destroys the right but the loss of caste or degradation which may follow thereupon. A more important passage of the same judgment is to be found at p. 29 of the report where the learned Judge quotes with approval the opinion of Babu Shama Charan Sircar to the effect that:

"The woman who is adulterous at the time when the succession opened, or who previously committed adultery which remained unexpiated by penance, forfeits her right to inheritance and maintenance; and not she who was previously adulterous, but ceased to be so and cohabited with her husband or expiated, or was about to expiate, the sin by penance before the time of succession"

The decision of Markby J., was appealed against and we have in the same report the decision of a Bench of two Judges who decided that appeal. Peacock, C. J., again referred to the words already quoted from Babu Shama Charan Sircar's work and quoted them with approval as

2. (1870) 14 W R O O 23=5 B L R 466.

3. (1880) 5 Cal 776=7 I A 115 (P O).

1. (1913) 36 Bom 138=12 I O 714.

embodying a correct statement of law on the point. These opinions seem sufficiently to cover the state of facts now before us. It may be noted further that in the Privy Council case to which reference has already been made the learned Judges reproduced, with an expression of their approval, a portion of the decision of Sir Barnes Peacock above referred to. In the portion so quoted stress is laid upon the practical inconvenience which might result if it were held that any act of unchastity on the part of the widow, committed after the succession had opened in her favour, were to be treated as divesting her of the estate. It is obvious that a similar argument from convenience may be relied on in support of the appeal now before us for a decision against the appellant would involve this consequence that a Hindu widow who had been living in peace and harmony with her husband at the time of his death, and had obtained possession of his estate might find her possession called in question years afterwards on the evidence, it may be of a spiteful or dishonest servant on the strength of acts alleged to have been committed by her many years prior to her husband's death. Their Lordships approved of the remark that although inconvenience would not be a ground for deciding a case like the present if the law were clear upon the subject it is an argument which may fairly be adduced under certain circumstances. The argument based upon ancient texts which have been relied upon on behalf of the respondent in the present case are in substance the same arguments which were considered by their Lordships of the Privy Council, and rejected as unsatisfactory, when the question before them was whether a Hindu widow could be divested of the estate of her late husband by reason of acts of unchastity committed during her widowhood. On the authorities, therefore and on general grounds of public policy and convenience, we think that this appeal ought to be allowed.

We set aside both the decrees of the lower appellate Court and restore the decree passed by the Court of first instance. The order of that Court as to costs will stand, but the defendant Radhey Lal will get his costs on the appeal filed by Bhawani Ram in the lower appellate Court and also his costs in this Court including fees on the higher scale. On the

other hand Radhey Lal will remain liable for his costs in the appeal filed by him in the lower appellate Court.

V.B./R.K.

Appeal allowed.

A. I. R. 1918 Allahabad 361

TUDBALL AND RYVES, JJ.

Emperor

v.

Khushi Ram and another—Accused.

Criminal Appeal No. 445 of 1917, Decided on 19th June 1917, from order of Sess. Judge, Mainpuri, D/- 11th April 1917.

Penal Code (1860), Ss. 399 and 402—Preparation — Members of gang agreeing to meet at rendezvous with arms — Accused arriving unarmed with others at rendezvous — There is preparation to commit dacoity — At least offence under S. 402 is proved.

Some members of a gang of robbers agreed to meet at a certain rendezvous taking with them what arms they had and in pursuance of that agreement K and L arrived unarmed together with others at that rendezvous where they were arrested.

Held: (1) that there was clear and distinct evidence against K and L of preparation for the commission of dacoity.

(2) that even if they could not be convicted under S. 399, the offence under S. 402 of the Code was proved against them. [P 362 C 2]

*W. Wallach—*for the Crown.

Judgment.—This is an appeal on behalf of the Local Government against an order of acquittal passed by the learned Sessions Judge of Mainpuri in respect to two accused Khushi Ram and Lakhpat. These persons were charged in the alternative with offences under S. 399 or 402, I. P. C. The facts in respect of which the Judge and the assessors were unanimous are as follows: Two Sub-Inspectors with some assistants were proceeding down a road after visiting the village of Nagla Bhura on 1st November in the Police Circle of Kurra. They came along the canal bank to the Takhrao Bridge. The time was between 8 and 9 p. m. They came upon three men. One was mounted and two were on foot and tried to run away when challenged. The mounted man was seized upon the spot. The other two ran away but being pursued one of them was caught. He was the man Narain, who has been tried with Khushi Ram and Lakhpat and has been found guilty and convicted. On the person of Narain were found four pistols, four powder flasks and some shots and bullets. The mounted man

was the approver Thulli, who was subsequently pardoned and has given evidence in this and other cases. On his pony, ingeniously concealed under a durri were a short carbine and a gun in two pieces. In his pocket was found a bundle of valuable gold and silver ornaments, the proceeds of certain dacoities. The firearms were nearly all loaded. Thulli on being questioned apparently saw that the game was entirely up, as he had been caught in possession of firearms and property taken in dacoities. He gave the information at once that he and his companions (the third man he names as being one Antu) were on their way to a rendezvous when they intended to commit a dacoity in the village of Sarb. He informed the police of the rendezvous which had been selected. The police officers collected some people from the neighbouring villages and, with Thulli and Narain proceeded to the rendezvous.

The people with the police were so distributed as to make it possible to arrest any of the other dacoits, should they come up. Thulli on the order of the Sub-Inspector called out into the darkness certain names which apparently would be recognized by his fellow dacoits. A reply came back from the darkness. Thulli replied and thereupon five persons approached; three were in front and two were further behind. The police made a dash upon them and secured three of them. Of these three Kushi Ram and Lakhpat were two and Kalka is the third. Lakhpat was dressed in Khaki and calmly stated that he was a policeman. Kalka, who has been convicted was found in possession of two ramrods which, according to the evidence of Thulli, had been made to fit two of the pistols which were found in Narain's possession and were without ramrods. The evidence of Thulli, if accepted clearly shows that these persons were collected together at the rendezvous taking with them what arms they could find with the intention of committing a dacoity at village Sarb. The learned Judge has found Narain and Kalka guilty under S. 399, I. P. C., holding that they had made preparation for committing a dacoity. In respect of Lakhpat and Khushi Ram he has acquitted them on the following grounds. He says:

"Lakhpat and Khushi Ram cannot be said to be guilty under S. 399, I. P. C., for going to a

rendezvous at night unarmed is not enough to constitute the offence of preparation of a dacoity. They can only be convicted under S. 402, I. P. C. if they were party of a body of five or more persons. Now the witnesses say that five men came up when Thulli called; two of them however did not come near and one witness is not sure whether there were five or only four. Clearly it cannot be held that the three men captured were in company with Thulli and Narain for these were in police custody and had no longer any intention of committing dacoity. Lakhpat and Khushi Ram can only be convicted if they had two comrades besides Kalka. This is I think doubtful. Moreover where were the rest of the gang? These men go out in large numbers not less than thirty. The arrest and search of Thulli had delayed them so that they were already late and it is more than likely that part of the gang if it assembled had already dispersed and there would have been no dacoity at all that night at Sarb or elsewhere. This being so I am not prepared to convict Lakhpat or Khushi Ram."

It is against this acquittal that the Local Government has appealed. The Judge and the assessors agreed in accepting the evidence for the prosecution as being true and worthy of belief. There was practically no defence whatsoever and certainly the defence evidence carries no weight at all. We cannot agree with the learned Sessions Judge that the facts which he has found do not constitute the offence of preparation for committing a dacoity. It is clear that the members of the gang had fixed upon a rendezvous, had agreed to meet at that rendezvous taking with them what arms they had, that in pursuance of that agreement Khushi Ram and Lakhpat together with others had arrived at the rendezvous and that Thulli and Narain were on their way to that same rendezvous when they were arrested by the police. In our opinion it is therefore clear and distinct evidence of preparation for the commission of dacoity. Even if the Judge did not convict under S. 399, it is clear that the offence under S. 402 is proved up to the hilt. The evidence of the witnesses, who have been believed is to the effect that there were at least five men at the rendezvous, three of whom were arrested. Even the one witness mentioned by the learned Sessions Judge says that: "four or five men came from the direction of Kurra and when they came three were caught and two escaped. There were five of them."

All the other witnesses distinctly say that there were five or six of them. In our opinion there is not the slightest doubt whatsoever on the evidence that the accused could have been convicted

under S. 402 as well as S. 399. We therefore convict Khushi Ram and Lakhpat of an offence under S. 399, I. P. C. and we sentence them to seven years' rigorous imprisonment each.

V.B./R.K.

Appeal accepted.

A. I. R. 1918 Allahabad 363 (1)

RICHARDS, C. J. AND BANERJI, J.

Mohni—Plaintiff—Appellant.

v.

Baij Nath and others—Defendants—Respondents.

Second Appeal No. 1135 of 1916, Decided on 25th April 1918, from a decree of First Addl. Dist. Judge, Aligarh.

Provincial Insolvency Act (1907), S. 22—On dismissal of objection, suit under O. 21, R. 63, making receiver party to such suit—S. 22 does not apply—Suit is not barred.

Plaintiff's house was attached in execution of a decree against S. S. was subsequently declared an insolvent and his property vested in the receiver. Plaintiff's objection was dismissed by the executing Court and he brought a suit for declaration of his title to the house, impleading the receiver as a party defendant :

Held : that S. 22 had no application to the case, inasmuch as the plaintiff was not complaining of any act or decision of the receiver but was complaining that the execution Court had disallowed his objection and decided that the house was the property of the insolvent.

[P 363 O 2]

Narain Prasad Asthana—for Appellant.

B. E. O' Conor, Peary Lal Banerji and Panna Lal—for Respondents.

Judgment.—This appeal arises out of a suit for a declaration of right. The plaintiff claimed a certain house as being her property. The house had been attached by one Baij Nath in execution of a decree against Salig Ram and Sagar Mal. Salig Ram and Sagar Mal were declared insolvents and any property they had, vested in the receiver. The Musamat, as already stated, claimed the property as being hers and said that it did not belong to Salig Ram or to Sagar Mal. Her objection having been disallowed, she was clearly entitled to bring a suit for a declaration of her title and a necessary party to that suit would be the receiver in insolvency, who represented the claims (if any) of Salig Ram and Sagar Mal and their creditors. Both the Courts below have dismissed the suit as being barred by the provisions of S. 22, Provincial Insolvency Act. That section is as follows :

"If the insolvent or any of the creditors or any other person is aggrieved by any act or decision of the receiver, he may apply to the Court, and the Court may confirm, reverse or modify the act or decision complained of and make such order as it thinks just."

The plaintiff in the present case was not complaining of any act or decision of the receiver in the insolvency. She was complaining that the Court which was executing the decree of Baij Nath had disallowed her objection and decided that the property was the property of the insolvents. It seems to us that S. 22 does not apply under the circumstances of the present case : see *Jhunkoo Lal v. Peary Lal* (1). The lower appellate Court has relied upon the case of *Mool Chand v. Murari Lal* (2). The facts there were quite different. The property had not been attached in execution of a decree but had been taken possession of by the receiver as being property belonging to the bankrupt. We allow the appeal, set aside the decree of the lower appellate Court and remand the case to that Court with directions to re-admit the appeal and deal with it according to law. Costs here and heretofore will be costs in the cause. Costs in this Court will include fees on the higher scale.

V.B./R.K.

Case remanded.

1. (1917) 39 All 204=38 I C 618.

2. A I R 1914 All 212=36 All 8=21 I C 702.

A. I. R. 1918 Allahabad 363 (2)

TUDBALL AND ABDUL RAOOF, JJ.

Kunj Behari Lal—Defendant—Appellant.

v.

Bhargava Commercial Bank—Plaintiff—Respondent.

Second Appeal No 950 of 1916, Decided on 22nd March 1918, from decree of Dist. Judge, Agra.

(a) Contract Act (1872), S. 176—Pawnee need not give pawnor information of actual date, time and place of sale—Pawnee has only to give reasonable time within which right of redemption is to be exercised.

Section 176, Contract Act, does not contemplate that the pawnee should give the pawnor information of the actual date, time and place of sale. The section does not mean that a sale should be arranged beforehand and that due notice of all the details should be given to the pawnor. All that the law intends is that the pawnee should give the pawnor a reasonable time within which to exercise his right of redemption and proceed to sell if the property be not redeemed.

[P 364 O 2]

A pawnee of certain articles or jewellery gave notice to the pawnor that unless the money was paid within a fortnight, the

jewellery would be sold without further reference to him. The notice did not mention the actual date, time and place of the intended sale. The articles were sold but the full amount of the debt was not realized. In a suit by the pawnee for the balance, it was contended that the notice given was not a reasonable notice of sale within the meaning of S. 176, Contract Act.

Held: that the notice given was a reasonable notice of the intended sale within the meaning of the section. [P 365 C 1]

(b) **Contract Act (1872), Ss. 107 and 176**—Pawnee's right of sale is analogous to seller's right of re-sale.

The pawnee's right to sell is analogous to the seller's right of re-selling granted under S. 107, Contract Act, and the two rights must be exercised in more or less the same method.

[P 364 C 2]

Kailas Nath Katju—for Appellant.

Narain Prasad Asthana and Mangal Prasad Bhargava—for Respondent.

Judgment.—The facts of this case are simple. The appellant-defendant pawned to the respondent Bank certain gold and silver ornaments as security for a loan in the year 1912. In January 1914 the Bank pressed the defendant for payment and stated they had an offer of Rs. 1,480 for the ornaments and that if the defendant did not pay within a week the ornaments would be sold for the value offered and that a suit would be brought for the balance. The defendant in reply asked for full particulars of the offer and also asked for time for payment. In his reply he stated that the ornaments were worth more than Rs. 2,400 and that he would hold the Bank responsible if they were sold for less than their value. The Bank on 26th February 1914 sent in a statement of account and a list of the ornaments pawned and again gave the defendant fifteen days' time within which to pay, otherwise the Bank would sell. The Bank did not carry out its threat. On 9th May 1914 the defendant again asked for 15 days' time as he had a chance of paying off the debt. The correspondence continued and again on 18th August 1914 the Bank wrote to the defendant stating that it had an offer of Rs. 1,500 for the ornaments and would proceed to sell. On 25th August the defendant asked for further time. On 12th September the Bank agreed, and then on 15th September it again wrote to the defendant saying that unless the money was paid within 15 days the jewellery would be sold without further reference to him. The Bank did not sell on 30th September but it actually waited till 5th October

and then carried out the sale. A suit was then brought for the balance and both the Courts below have decreed the claim. One point was urged in the Court below, and that is, that the notice given on 15th September was not a reasonable notice of the sale within the meaning of S. 176, Contract Act. It was contended that notice of the actual date, time and place of the intended sale should have been given to the defendant. This plea was repelled by the Court below. It has again been raised before us, and this is the only point for our decision.

It is urged that under S. 177 the pawnor has a right to redeem at any subsequent time before the actual sale of the goods, that unless he is given full information of the date, time and place of the sale it is impossible for him to redeem if the property were sold at some other date, time or place. No ruling on the point has been cited. In our opinion S. 176 does not contemplate that the pawnee should give the pawnor information of the actual date, time and place of sale. The words are:

"He may sell the thing pledged on giving the pawnor reasonable notice of the sale."

This, in our opinion, means an intention to sell and it does not necessarily mean that a sale should be arranged beforehand and that due notice of all the details should be given to the pawnor. For instance, it would be open to the pawnee to put up the property to auction sale and to sell it to the highest bidder. It would be impossible for him to give the pawnor information beforehand as to who would be the final purchaser. It is quite clear that all that the law intends is that the pawnee should give the pawnor a reasonable time within which to exercise his right of redemption and proceed to sell if the property be not redeemed. His right to sell is analogous to the seller's right of re-selling granted under S. 107, Contract Act, and we take it that the two rights must be exercised in more or less the same method. The seller's right to re-sell under S. 107 may be exercised after giving notice to the buyer of the intention to re-sell after the lapse of a reasonable time. The language of the two sections is slightly different but their meaning is practically the same. In our opinion in the circumstances of the present case the respondent Bank gave the

appellant notice and a very reasonable notice indeed, of the intended sale. We think the decision of the Court below is correct. We therefore dismiss the appeal with costs.

V.B./R.K.

Appeal dismissed

A. I. R. 1918 Allahabad 365

BANERJI, J.

Bhagwan Din and others—Applicants.
v.

Emperor—Opposite Party.

Criminal Revn. 149 of 1918, Decided on 4th May 1918, from order of Magistrate First Class, Fatehpur.

Penal Code (1860), Ss. 441 and 447—Criminal trespass—Absence of criminal intent—Offence cannot be said to be committed.

Complainant, a zamindar, brought a suit in the Revenue Court to eject the accused from a holding. The accused pleaded that they were occupancy tenants of the holding but their plea was overruled and a decree of ejectment was passed against them. Formal possession of the holding was delivered to the complainant under the decree. The accused appealed and during the pendency of their appeal, they entered on the holding and ploughed up the land for cultivation. Subsequently, it was held in the appeal that one of the accused was entitled to occupancy rights in the holding:

Held: that under the circumstances it could not be said that the accused intended to commit an offence or to intimidate, insult or annoy the zamindar decree-holder, when they entered on the land which formed their occupancy holding for the purpose of ploughing and cultivating it.

[P 365 C 2]

Kailas Nath Katju—for Applicants.

R. Malcomson—for the Crown.

Judgment.—This is an application for revision of an order by which the applicants have been convicted under S. 447, I. P. C., and sentenced to fine. The facts are these:—The zamindar brought a suit for ejectment in a Revenue Court against Bhagwan Din accused and others on the allegation that they were tenants without rights of occupancy. They pleaded that they were occupancy tenants. The Court of first instance decided against them and made a decree for ejectment on 26th June, 1917. On 23rd August 1917 possession was delivered to the decree-holder. Of course the possession which was so delivered, was only formal possession, the lands not having any crops on them at the time and the decree-holder after delivery of possession not having ploughed the lands or sown any crops. The defendants to that suit preferred an appeal from the decree of the

Court of first instance and during the pendency of the appeal they, on the 11th October 1917, entered on the land and tried to plough it. It is in consequence of this act that they were prosecuted and have been convicted. Two contentions have been raised in this case. The first is that the decree-holder zamindar had never got actual possession and therefore could not be deemed to have been in possession within the meaning of S. 441, I. P. C., and the second is, that there was no intention to commit an offence or to intimidate, insult or annoy any one in possession. In support of the first contention the case of *In the matter of the petition of Gobind Prasad* (1) was referred to. The view taken in that case was followed in *Kunji Lal v. Emperor* (2). I do not deem it necessary for the purposes of this case to decide whether the possession delivered to the zamindar, was actual possession or not within the meaning of the decisions to which I have referred and whether the possession mentioned in S. 441, I. P. C., means actual possession or formal possession delivered by a Court.

The real question is, whether there was any intention to commit an offence or to intimidate, insult, or annoy the zamindar. As the result shows Bhagwan Din, the person whose ejectment had been ordered, was not liable to ejectment as it was held by the appellate Court subsequently that he was a tenant with rights of occupancy and the order of ejectment was set aside by that Court. Under these circumstances it cannot be said that the persons who were the tenants of the land and who as the event proved, were not liable to ejectment, intended to commit an offence, or to intimidate, insult or annoy the zamindar, decree-holder, when they entered on the land which formed their occupancy holding for the purpose of ploughing and cultivating it. There was clearly no mala fides and they were apparently acting in the belief that they were entitled to continue in possession. In this view their conviction by the Court below was illegal and improper. I accordingly allow the application, set aside the order of the Court below, acquit the applicants of the offence of which they were convicted.

1. (1878-80) 2 All 465.

2. A I R 1914 All 220=21 I O 681=14 Or L J 683.

and direct that the fines imposed on them, if paid, be refunded.

v.B./R.K. *Conviction set aside.*

A. I. R. 1918 Allahabad 366

RICHARDS, C. J. AND BANERJI, J.

Damber Singh — Judgment-debtor—Appellant.

v.

Kalyan Singh—Decree-holder — Respondent.

Execution Second Appeal No. 71 of 1917, Decided on 12th November 1917, against decree of 2nd Addl. Judge, Aligarh, D/- 30th June 1916.

(a) Mortgage—Suit on—Successful plaintiff ordinarily gets costs against mortgaged property and not personally against defendant—Civil P. C. O. 34, Rr. 4, 5 and 10.

Ordinarily the plaintiff in a mortgage suit gets his costs, if successful, against the mortgaged property and not personally against the defendant. [P 266 C 2]

Plaintiff sued on a mortgage and got a decree in the first Court, but the suit was dismissed on appeal. In second appeal the High Court restored the decree of the first Court. The decree of the High Court stated that the appeal was allowed, the decree of the lower appellate Court set aside and the decree of the first Court restored, and ordered further "that the respondent do pay to the appellant Rs. 554-6-9, the amount of costs incurred by the latter in this Court and in the lower appellate Court":

Held: that considering the nature of the suit, the judgment of the High Court upon which the decree was founded and the general practice of the Court, it was clear that the intention of the High Court was that there should be the ordinary mortgage-decree awarding the costs incurred in the suit which were to be realized by sale of the mortgaged property. [P 367 C 1]

(b) Civil P. C. (1908), O. 41, R. 35—Mortgage suit—Costs.

In mortgage suits where it is the intention of the High Court that the costs should be recoverable out of the property and not personally against the party, the decree should so state expressly. [P 367 C 1, 2]

Pyare Lal Banerjee—for Appellant.

Sarat Chandra Chowdhri — for Respondent.

Judgment.—This appeal arises under the following circumstances. A suit was brought to realize the amount of a mortgage. The property mortgaged was mortgagee rights. The facts are somewhat complicated but it is not necessary to mention them in detail. The Court of first instance decreed the plaintiff's suit. On first appeal the decision of the Court of first instance was overruled and the suit dismissed. On second appeal to the High Court the decree of the first Court was

restored. In its judgment the High Court says:

"We must allow the appeal, set aside the decree of the lower appellate Court and restore the decree of the Court of first instance with costs in all Courts. We extend the time for payment to six months".

The decree of the High Court was drawn up upon one of the High Court's forms. It states that the appeal has been allowed, the decree of the lower appellate Court set aside and the decree of the Court of first instance restored. It further contains the words:

"and it is further ordered that the respondent do pay to the appellant Rs. 554-6-9, the amount of costs incurred by the latter in this Court and in the lower appellate Court".

The decree of the Court of first instance which was restored by the High Court was the ordinary mortgage decree in the form prescribed by O. 34. The plaintiff applied to execute the decree of the High Court for costs personally against Dambar Singh (the appellant in the lower appellate Court and the unsuccessful respondent in the High Court.) Dambar Singh objected that the costs were not payable by him personally and that the decree-holder could only obtain them by bringing the property to sale. Both Courts overruled his objection. Dambar Singh comes here in second appeal. There can be no doubt that, ordinarily speaking, the plaintiff in a mortgage suit gets his costs, if successful, against the mortgaged property and not personally against the defendant. It could not be contended that under the decree of the Court of first instance (subsequently restored by the High Court) the plaintiff could get his costs personally against Dambar Singh. If the decree of the High Court had expressly followed the judgment, we do not think it could be contended that Dambar Singh was personally liable for the costs. Accordingly the respondent is driven to rely upon the words which we have quoted from the decree of the High Court. There cannot be the least doubt that there is no intimation in the judgment that the High Court intended to make Dambar Singh personally liable. It seemed almost certain that under ordinary circumstances in a case similar to this the plaintiff in a mortgage suit would add the costs incurred by him in the High Court to his costs incurred in the Courts below and sell the property to realize those costs.

We think that we are entitled in construing the decree in the present case to consider first the nature of the suit, secondly the judgment of the High Court upon which the decree is founded and the general practice of the Court. Considering these three matters it seems to us quite clear that the intention was that there should be the ordinary mortgage decree awarding the costs incurred in the suit and up to the time of the final decree to be realized by sale of the mortgaged property. It is contended that we are bound by the actual words of the decree itself and we are not entitled to consider any other matter.

The very same question seems to have arisen in the case of *Maqbul Fatima v. Lalta Prasad* (1). In that case a decree which had been drawn up in accordance with the requirements of S. 88, T. P. Act, contained a further clause that

"the defendant should pay to the plaintiffs a sum of Rs. 876, the amount incurred by them."

The majority of the Court held that the costs could not be recovered personally against the defendant and that the Court construing the decree was entitled to consider the terms of the judgment. The same point seems to have arisen in an unreported case, *Execution Second Appeal No. 871 of 1900*, when two Judges arrived at a similar conclusion. We have been referred to the case of *Mahomed Sadiq v. Ghaus Mahomed* (2) and also to the case of *Bansgopal Singh v. Rup Narain Singh* (3). In the first case an authority was relied upon by the learned Judge which has since been dissented from. The other case seems to turn upon the particular facts of the case and the view which the learned Judge, sitting alone, took as to the construction of the decree. If these cases are inconsistent with the Full Bench decision and the decision of the Divisional Bench we are bound to follow the latter. While we decide in favour of the appellant, we think it right to say that the form used by the High Court is not strictly correct and applied to mortgage suits, O. 41, R. 35, prescribes what a decree of the appellate Court shall contain, and it would seem that it would be more accurate that in mortgage suits, where it is the intention of the Court that the costs should be re-

coverable out of the property and not personally against the party, that the decree of the High Court should so state. It perhaps may also be considered whether in mortgage suits in which the High Court is making a decree for sale the High Court's decree, instead of merely being a dismissal or affirmation of the decree of the lower Court, should not be in the form prescribed by O. 34 directing the property to be sold and stating the amount which is to be recovered from the property, including costs. In a recent Full Bench case it was decided that the High Court's decree in a mortgage suit is the decree which is to be subsequently made absolute and not the decree of the Court below. We wish also to say that we do not desire to be understood as holding that it is not open to the Court in mortgage suits to make a decree under special circumstances, directing that costs ought to be paid personally by a party instead of being recovered as part of the mortgage debt. We allow the appeal, set aside the orders of both the Courts below and dismiss the application for execution with costs in all Courts. Costs in this Court will include fees on the higher scale.

V.B./R.K.

Appeal allowed.

A. I. R. 1918 Allahabad 367

RICHARDS, C. J. AND TUDBALL, J.

Mahomed Abdul Rashid Ali Khan—
Judgment-debtor—Appellant.

v.

Budh Sen and another—Decree-holders—Respondents.

First Appeal No. 65 of 1918, Decided on 24th July 1918, from order of First Addl. Sub-Judge, Aligarh.

Civil P. C. (1908), O. 21, R. 92—Decree-holder purchaser in mortgage-decree for sale—Compromise between judgment-debtor and purchaser—Sale set aside—Court has power to do so.

Certain property was sold in execution of a mortgage-decree and was purchased by one of the decree-holders. The judgment-debtor applied to set aside the sale on the ground that a compromise had been arrived at between the parties prior to the sale. The decree-holders, through their pleader, consented to the sale being set aside.

Held: that there being no opposition on the part either of the purchaser or of the decree-holders, the Court had power to set aside the sale.

[P 368 C 1]

Benoy Kumar Mukerji—for Appellant.

Judgment.—The facts connected with this appeal are as follows: There had

1. (1898) 20 All 523 (F B).

2. (1914) 22 I O 42.

3. (1913) 19 I O 384.

been a mortgage-decree. The property was advertised and put up to sale in the usual way and actually sold. After the sale one of the decree-holders purchased it (in all probability on behalf of himself and the other decree-holder). It appears that there had been some attempt at a compromise before the sale actually took place, which fell through. It is alleged that the property was sold considerably below its value, because possible bidders were kept away thinking that the matter had been compromised between the parties. That something of this kind occurred is strongly corroborated by the fact that when an application to set aside the sale was made, the pleader for both decree-holders signed the petition in token of the agreement of the decree-holders that the sale should be set aside. The learned Judge has not disputed the matters that we have mentioned in his judgment.

On the contrary his judgment simply says that there is no law by which a sale can be set aside when the judgment-debtor and decree-holder consent. In the present case both the decree-holders through their pleader consented to the sale being set aside; and one or both of the decree-holders was the purchaser or purchasers of the property. Therefore every one concerned consented, and there does not appear to have been any opposition on the part of either the purchaser or the decree-holders. Under these circumstances we think the Court below ought to have set aside the sale and had power to do so. Even in this Court apparently the decree-holders, who, as we have already said, are also the purchasers, are absent and apparently raise no objection to the appeal being allowed. We allow the appeal, set aside the order of the Court below and set aside the sale, and direct that the property be re-sold according to law. We make no order as to costs. Let our order be sent down as soon as possible.

V.B./R.K.

*Appeal allowed.***A. I. R. 1918 Allahabad 368**

RICHARDS, C. J. AND BANERJI, J.
Net Ram—Appellant.

v.

Bhagirath Lal and others — Respondents.

First Appeal No. 40 of 1917, Decided on 1st November 1917.

Provincial Insolvency Act (1907), S. 15—
Court can refuse order of adjudication only in cases prescribed by the Act.

An insolvency Court is not justified in dismissing a petition for adjudication simply because it thinks it necessary that the brother of the petitioner, who is joint with him, must be joined in the petition. The Court is only justified in refusing an order of adjudication in the cases prescribed by the Provincial Insolvency Act.

[P 368 C 2]

A. H. C. Hamilton—for Appellant.

Judgment.—This appeal arises out of an application made by the appellant to the District Judge of Meerut to be adjudicated an insolvent. It is not very clear from the judgment of the learned District Judge upon what grounds he rejected the application. S. 5, Provincial Insolvency Act, provides that where a debtor commits an act of insolvency, a petition for adjudication may be presented by a creditor or by the debtor. The presentation of a petition to be declared insolvent is deemed to be an act of insolvency within the meaning of the section. S. 15(1) mentions certain matters which will justify the Court in dismissing the petition of insolvency. S. 16(1) provides that where a petition is not dismissed for any of the matters mentioned in S. 15, the Court shall make an order of adjudication. It would therefore appear that the Court is only justified in refusing an order of adjudication in the cases prescribed by the Act. So far as we have been able to understand the order of the District Judge he dismissed the application because he thought that it was necessary that the brother of Net Ram, who was joint with him should have joined in the application. The concluding words of the order are "at present I reject the dishonest application of Net Ram as premature." We may refer to the recent decision of their Lordships of the Privy Council in the case of *Chatrapat Singh Dugar v. Kharrag Singh Lachmiram* (1) and also to the case of *Triloki Nath v. Badri Das* (3). We allow the appeal, set aside the order of the learned District Judge and remand the case to him with directions to re-enter the application in the list of pending cases and proceed to hear and determine the same according to law. We make no order as to costs. No one appears

1. A I R 1916 P C 64=44 Cal 595=39 I C 788 (P C).

2. A I R 1914 All 17=36 All 250=23 I C 4.

on the other side and respondent 7 has not been served.

V.B./R.K.

Case remanded.

A. I. R. 1918 Allahabad 369 (1)

WALSH, J.

Lachmi Narain—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 268 of 1917, Decided on 28th April 1917, from order of Sess. Judge, Allahabad, D/- 24th February 1917.

Penal Code (1860), S. 289 — Ferocious animal letting loose is offence but in case of dog it must be proved that it had biting tendency—Tort, Damages.

To allow liberty to a ferocious animal is in itself likely to cause danger to human beings. But in the case of an ordinary domestic animal, e. g., a dog, there is no presumption that it is likely to bite human beings.

Therefore in order to obtain a conviction under S. 289, against the owner of a dog, it must be proved that that particular dog had a tendency or character of biting human beings [P 369 C 1]

P. L. Banerji—for Petitioner.

R. Malcomson—for the Crown.

Judgment.—This is a very small matter. The case has not been satisfactorily tried, and strictly speaking it ought to be sent back to be tried again. The Magistrate begins by stating that the offence charged is "not taking proper care of his dog." That is not the offence nor is it an offence known to law. The offence with which the accused was charged was:

"knowingly or negligently omitting to take such order with his dog as was sufficient to guard against any probable danger of grievous hurt from such animal."

In the case of a ferocious animal it is quite clear that to allow it liberty is in itself likely to cause danger to human beings. But in the case of a dog it must be shown that it is likely to bite human beings. There is no presumption in the case of an ordinary domestic dog that it is likely to bite human beings. There are many dogs who are likely and there are some dogs who are actually trained to do so. But it must be proved against the owner of the dog that this particular dog had a tendency or character of biting human beings. There was direct evidence against this dog having previously this character and that complaints had been made to the accused against its conduct. But the Magistrate came to no conclusion at all upon that direct evidence, and indeed he does not seem to have addressed himself to the separate and independent

1918 A/47 & 48

point whether the dog had the character of biting human beings. He says:

"it is admitted that the accused had a dog about a year ago which bit three women and for which the accused had to pay."

He does not even find that the admission was made with reference to this dog in question and in fact there is no admission of any kind on the evidence. Therefore the case ought to go back for the facts to be found upon the evidence with reference to the charge. But it seems to me to be a trivial case, which does not merit the time and money already spent on it to be spent all over again. The result of this unfortunate bite was that according to the medical evidence the complainant had five superficial pea-sized punctures in close proximity at the back of his left leg. They appear to have caused no other consequences. Of course dog-bite may be a serious matter and may be a very serious matter indeed. But that it not a reason for treating every dog bite as a serious thing in itself. The complainant said nothing at all about his physical suffering. I think the Assistant Government Advocate is probably right that it was merely mental suffering. The accused has been fined Rs. 40, of which Rs. 25 have been awarded to the complainant for this mental suffering. I think the amount is excessive. With the consent of the accused, who, in law has the right to have the case sent back for proper trial, I reduce the fine to Rs. 5 and I award Rs. 3 of this to the complainant. Any sum, if realized in excess of Rs. 5, must be refunded to the accused.

V.B./R.K.

Fine reduced.

A. I. R. 1918 Allahabad 369 (2)

RICHARDS, C. J. AND BANERJI, J.

Jaint Singh and others—Petitioners.

v.

Gosain—Opposite Party.

Civil Misc. Ref. No. 112 of 1918, Decided on 6th May 1918, made by Government, United Provinces.

Hindu Law—Alienation—Widow—Gift to daughter and daughter's son—Suit for declaration by reversioners that gift is invalid—Decree, form of stated.

Under the Hindu law where a widow makes a gift of her husband's property to her daughter and daughter's son, and a reversioner of the husband sues for a declaration that the gift is invalid, a decree can be given declaring that the gift to the daughter's son as a gift will not bind the plaintiff after the death of the donor. No such decree, however, can be given as against the daugh-

ter inasmuch as she would be entitled to succeed to the property on the death of her mother.

[P 370 C 2]

M. L. Agarwala—for Petitioners.

Kailas Nath Katju — for Opposite Party.

Judgment.—This is a reference under the Kumaun Rules. The plaintiff brought a suit for a declaration relating to a certain deed of gift. It appears that Puran Singh died leaving him surviving a widow and a daughter, and a daughter's son. The widow made a deed of gift in favour of her daughter and her daughter's son. The suit was for a declaration that this deed of gift was not binding upon the plaintiff (who alleged himself to be the nearest reversioner) and that he was the heir after the death of the widow. The defence was that the plaintiff was not entitled to maintain the suit, that after the death of the widow her daughter (who was a defendant to the suit) would be entitled to the property for her life and after the death of the daughter her son would be entitled. The plaintiff replied to this that there was a custom prevailing in Kumaun under which the daughter and daughter's son were excluded from inheritance. The Court of first instance decided that the custom set up by the plaintiff existed and granted the plaintiff a decree. The Deputy Commissioner held that there was not sufficient evidence to prove the existence of a custom, and that being so, the ordinary rules of Hindu law must prevail, in which case the daughter and daughter's son would succeed, and dismissed the plaintiff's suit. The learned Commissioner simply made a decree in favour of the plaintiff declaring that the gift to the grandson would not bind the plaintiff beyond the lifetime of the donor, the widow. We have been asked by Government to advise as to the correctness of the decision of the learned Commissioner and say whether he should not have decided the issue of the existence of the custom, and further to give Government an expression of our opinion on the case in general.

Had the question arisen outside of Kumaun we think that the Commissioner was bound to have accepted the finding of the Deputy Commissioner that the custom did not exist. So far as this question was a question of fact the Deputy Commissioner was the Court to decide it.

The Commissioner as the Court of second appeal could only interfere upon a question of law, and the only possible question of law which could have arisen was the question upon whom the onus lay that is to say, whether in Kumaun it can be said that a general rule of law prevails excluding daughters and a daughter's son in such a way as would throw the onus on the defendants of showing that there was an exception in their case. We have no hesitation in saying that if the question had arisen outside Kumaun, the onus of proving a custom different from the ordinary Hindu law would undoubtedly have lain on the plaintiff who came into Court on the basis of a custom of that description. The learned Commissioner has given a very guarded decree. He has only declared that the gift to Jaint Singh, that is the daughter's son as a gift will not bind the plaintiff after the death of the donor. Even on the assumption that the ordinary rules of Hindu law prevailed and governed the parties, such a decree might be granted as against the daughter's son as was done in the case of *Raja Dei v. Umed Singh* (1). On the same assumption no decree can be given against the daughter, because she would be entitled under the ordinary Hindu law to succeed on the death of her mother. We think therefore that we cannot say that the decree of the Commissioner was wrong. As to whether he ought or ought not to have decided the question of the existence of the custom is more difficult and raises a very important question in Kumaun. There seems to be little doubt that the custom of the exclusion from inheritance of daughters and daughter's sons does, at least to some extent, prevail in Kumaun, and having regard to the decree which the Commissioner made, it was not strictly necessary for him to decide this issue, involving as it did a question of very great difficulty. We think under all the circumstances the decree of the Commissioner may be affirmed and we think that the parties ought to bear their own costs in all Courts.

V.B./R.K.

Decree affirmed.

1. (1912) 34 All 207=18 I C 632.

A. I. R. 1918 Allahabad 371

KNOX, J.

Mangal Prasad and another—Plaintiffs
—Applicants.

v.

Nabi Baksh and another—Defendants
—Opposite Parties.

Civil Revn. No. 208 of 1916, Decided on 29th March 1917, from an order of Sm. C. C. Judge, Cawnpore.

(a) Assignment—Rights of assignee — Assignee suing on assignment and proving it—Adverse party cannot deny consideration—Rule does not apply when transferor being party to litigation pleads that it is fictitious.

As a general rule where an assignee sues on his assignment and proves it, an adverse party cannot take the objection that there was no consideration for the assignment, but the rule is not invariable and does not apply where the transferor, being a party to the litigation, does not admit the assignment but on the contrary pleads that it is fictitious and without consideration : 33 *All.* 526, *Foll.* [P 372 C 1]

(b) Contract Act (1872), S. 23—Agreement to finance litigation and share fruits thereof ought to be carefully watched.

An agreement to finance litigation and to share the fruits thereof ought to be carefully watched and when found to be extortionate and unconscionable so as to be inequitable or to be made not with the bona fide object of assisting a claim believed to be just and of obtaining a reasonable recompense therefor, but for improper objects so as to be contrary to public policy, effect ought not to be given to it : 2 *Cal.* 233 (*P.C.*), *Foll.* [P 372 C 1]

Kailash Nath Katju—for Applicants.

Muhammad Yusuf — for Opposite Parties.

Judgment. — This is an application for the revision of a decision of the Small Cause Court Judge of Cawnpore. The record contains three documents on which both parties have laid considerable stress in the arguments addressed to me. The first two are bonds, both of them bearing date 15th March 1913. The sum said to be due under these bonds by one Nabi Baksh and another in favour of Mt. Sanjhli is some Rs. 400 odd. Mt. Sanjhli is described as a widow and by caste Bhurji. According to the deed of sale bearing date 2nd February 1916, Mt. Sanjhli sold all her rights under the two bonds of 15th March 1913, to Mangal Prasad described as a Baqqal and Manbodhan Singh described as a Thakur, residents of Cawnpore. The consideration mentioned in the deed of sale is a ruqqa, dated 28th November 1915, for Rupees 359-7-6, payable on demand and a cash payment of Rs. 50.

This sale deed was registered on 5th

February 1916, on which date an agreement was executed by Mangal Prasad in favour of Mt. Sanjhli : in this document Mangal Prasad agrees to sue out the bonds, bear the expenses of the litigation, and divide any proceeds arising out of a decree between himself and Mt. Sanjhli after deducting the costs of the litigation. This document purports to be attested by two men whose mere names are given without any description of occupation or residence even. The value of this precious document executed after the sale-deed and in more than one point contradicting its terms may be easily imagined. Mangal Prasad and Manbodhan Singh then appear to have instituted a suit, out of which this revision arises, in the Small Cause Court, Cawnpore, and to have arrayed as defendants Nabi Baksh and Mt. Sanjhli and based the suit upon the bonds of 15th March 1913. The answer given by Nabi Baksh is that he has paid up everything that was due under the bonds with the exception of Rs. 30. Mt. Sanjhli said that full consideration had not been paid to her. The Judge of the Small Cause Court in dealing with these statements found that out of the cash consideration of Rs. 50 the plaintiffs took back Rs. 30. He looked upon the agreement as a mere ostensible transaction. It is not very clear what exact meaning the learned Judge intended to attach to the word "ostensible." But on comparing it with the same word which occurs a second time in the judgment, namely, in the passage "for Rs. 400 ostensibly paying the Musammatt only Rs. 50," I arrive at the conclusion that he used the English word ostensibly as equivalent to *ism farzi*. He adds to his judgment : It appears to me that the suit is a champertous one", and elsewhere : "The plaintiff thus has started on a speculation and purchased litigation." As regards the defence of Nabi Baksh, he simply does not believe it.

Finally he dismissed the suit. I am asked to interfere on the ground that the English law of champerty does not apply to British India and the dismissal of the plaintiff's suit on the alleged ground of champerty was illegal and arbitrary, and that upon the finding that payment of amount of the bond had not been proved the suit should have been decreed. In support of this contention I was referred by the learned vakil for the applicants to

the Privy Council case of *Bhagwat Dayal Singh v. Debi Dayal Sahu* (1). That case is not of much assistance. Their Lordships expressly said that in that particular case, while it was badly argued that although the English law as to maintenance and champerty is not applicable to India, yet there existed principles in the Indian law which were very similar in effect to that law, they were of opinion that that proposition could not be supported. As regards the question whether the transaction was an unfair and unconscionable bargain for an inadequate price, they held that that was a question between assignor and assignee and they found it unnecessary to decide that question as the suit was one in which the assignor did not seek to repudiate the transaction but asked that effect should be given to it. The circumstances of that case therefore are wholly different from the one before me. In the present case the assignees have placed the assignor in the array of the defendants as an opposing party. In *Baldeo Sahai v. Harbans* (2) it was

"held that, although as a general rule where an assignee sues on his assignment and proves it, an adverse party cannot take the objection that there was no consideration, the rule is not invariable and would not apply where the transferor being a party to the litigation had never admitted the assignment, but on the contrary had pleaded that it was fictitious and without consideration."

I incline to the view that the learned Judge really acted upon the finding that the plaintiff has started on a speculation and purchased litigation. In *Ram Coomar Coondoo v. Chunder Canto Mookerjee* (3), their Lordships of the Privy Council held that

"agreements of this kind ought to be carefully watched, and when found to be extortionate and unconscionable so as to be inequitable against the party, or to be made not with the bona fide object of assisting a claim believed to be just, and of obtaining a reasonable recompense thereof, but for improper objects . . . so as to be contrary to public policy,—effect ought not to be given to them."

The more one considers the facts of this case, the more it appears to be a complete mixture of all sorts of sharp practice and fraud. This is a case where diamond would cut diamond. I think that an experienced Indian Officer like the Judge of the Small Cause Court, Cawnpore, was perhaps quite, if not

more, competent to arrive at the real merits of this case than I may be. I am not prepared to interfere. I dismiss the application but I allow no costs in this revision.

V.B /R.K.

Appeal dismissed.

A I. R. 1918 Allahabad 372

KNOX, J.

Magan Lal —Accused—Applicant.

v.

Ganesh Prasad—Complainant—Opposite Party.

Criminal Misc. No. 11 of 1911, Decided on 30th January 1918, for transfer from Honorary Magistrate, 1st Class, Allahabad.

Criminal P. C. (1898) S. 526—Charge under Penal Code Ss. 211 (2)—Honorary Magistrate having no experience of criminal trials is not proper tribunal—Unnecessary adjournments by Magistrate are sufficient for transfer of case.

A charge of an offence falling under the second clause of S. 211 should not be sent for trial or inquiry to an Honorary Magistrate having no experience of criminal trials and the mere fact of the Magistrate making unnecessary adjournments in the inquiry or trial of such a case is a sufficient ground for the transfer of the case from his Court. [P 373 C 1]

P. L. Banerji —for Applicant.

S. C. Mukerji—for Opposite Party.

Judgment.—This is an application presented to this Court under S. 526, Criminal P. C. I am asked that the case of *Magan Lal* versus *Ganesh Prasad* now pending in the Court of Raja Partab Bahadur, Honorary Magistrate, First Class Allahabad, be either directed to be committed for trial to the Court of Session or transferred for trial to some other competent Magistrate. From the affidavit filed in connection with this application it appears that *Magan Lal* was tried in the Court of the Joint Magistrate of Allahabad on the complaint of *Ganesh Prasad* charging *Magan Lal* with offences under Ss. 409 and 420, I. P. C. *Magan Lal* was acquitted after trial by the Joint Magistrate. He then obtained sanction from the Joint Magistrate's Court to prosecute *Ganesh Prasad* for having falsely charged him with offences under Ss. 409 and 420, I. P. C. The case was transferred by the Joint Magistrate of Allahabad to the Court of Raja Partab Bahadur, Honorary Magistrate, First Class, Allahabad, and came to his Court on 21st August 1917. It has been therefore pending for about four months and is still incomplete. The ground urged for transfer or

1. (1908) 35 Cal 420=35 I A 48 (PO).

2. (1911) 33 All 626=11 I O 932.

3. (1876-77) 2 Cal 233=4 I A 23 (PO).

for the order prayed for is inter alia that the learned Honorary Magistrate does not know the English language and the applicant deponent is put to trouble and expense in being made to file translations from English judgments into Urdu and that there have been already several unnecessary adjournments due to the fact that the learned Magistrate begins his sittings between 3 and 4 p. m. A further contention is raised in the affidavit that the Honorary Magistrate has kept the case for trial in his Court although he has no jurisdiction to try it. I have examined the statement made by the complainant Ganesh Prasad when he first made his complaint. There is no doubt that he did charge Magan Lal with offences under Ss. 409 and 420, I. P. C. It is alleged that that complaint was a false one.

If so, it was a false complaint of these specific offences and was therefore a false complaint falling within the para. 2, S. 211, I. P. C. Criminal proceedings were instituted upon a complaint of an offence punishable with transportation for life or imprisonment of either description for a term which may extend to ten years. If the complaint was a false one, of course it is clearly to be understood that I commit myself to no opinion of any kind as to whether the charge was true or false, the charge and the criminal proceedings ensuing therefrom were of a very serious nature. It is a case which ought to be tried either by a Court of Session or at any rate by a Magistrate of considerable experience, and it is not a case of the kind that should have been sent for trial to an Honorary Magistrate who does not appear to have had much experience in the trial of criminal cases. I say this because on looking to the order sheet I find adjournments and cross-examinations allowed which are never intended by law and which should never be granted by any Magistrate of experience. I find that the complainant was cross-examined on four different occasions and this is a mere sample of the kind of procedure which received the sanction of the Honorary Magistrate. The mere fact that the inquiry or so called trial has lasted for nearly four months calls for the case being removed from the Court of the Honorary Magistrate and tried by some one of experience in these matters. I

understand that all the evidence for the prosecution has been taken and I direct that the case be now committed for trial to the Court of Session on the charge of instituting or causing to be instituted a false charge of offences under Ss. 409 and 420, I. P. C. and therefore falling within Cl. 2, S. 211, I. P. C. a case which is triable by a Court of Session. Let the record be returned.

V.B./R.K.

Record returned.

A. I. R. 1918 Allahabad 373

RICHARDS, C. J. AND TUDBALL, J.

Gulzar Ali—Plaintiff—Appellant.

v.

Siadat Husain and others—Defendants—Respondents.

Second Appeal No. 696 of 1916, Decided on 28th April 1917, from decree of Dist. Judge, Moradabad. D/- 2nd February 1916.

Pre-emption — Wajibularz — Entry in — Sale to relation — Nearer relation held had right to pre-empt.

Where the wajibularz of a village recognised the custom of pre-emption in the following terms:

"If any cosharer wishes to transfer his (landed) property by sale or mortgage, then he can transfer it in the first instance to a cosharer relation according to the gradation of relationship and in case of his refusal, to other cosharers for a reasonable price. If no cosharer in the property takes it, then he has the option to transfer it to whomsoever he likes If any one makes a transfer in favour of his children or near relation (qarabatdar qaribi), then no one else has a right of pre-emption";

Held: that even in the case of a sale in favour of a relation, a nearer relative of the vendor would have a right of pre-emption. [P 373 C2; P 374 C1]

Agha Haidar—for Appellant.

Iqbal Ahmad for S. M. Sulaiman — for Respondents.

Judgment.—This appeal arises out of a suit for pre-emption. Both the pre-emptor and the vendee are relatives of the vendor but according to the finding of the lower appellate Court, the pre-emptor is one degree nearer than the vendee. The Court of First Instance decreed the plaintiff's claim. The lower appellate Court reversed the decree and dismissed the suit. Both parties admitted that the custom of pre-emption prevailed. Both parties relied upon the entry in the wajibularz as setting forth what that custom was. If the wajibularz was as interpreted by the lower appellate Court, the judgment of that Court would have been quite correct. It has however omitted to appreciate that the entry in the wajibularz expressly states that the offer is to b.

made to the relations in their order of relationship. This being so, we think that the decision of the lower appellate Court on this preliminary point was not correct. We allow the appeal, set aside the decree of the lower appellate Court and remand the case to that Court with directions to re-admit the appeal upon its original number in the file and proceed to hear and determine the same according to law. Costs here and heretofore will be costs in the cause.

V.B./R.K.

*Case remanded.***A. I. R. 1918 Allahabad 374 (1)**

RICHARDS, C. J. AND TUDBALL, J.

Chitan Singh—Plaintiff—Appellant.

v.

Baldeo Singh and others—Defendants—Respondents.

Second Appeal No. 275 of 1916, Decided on 2nd May 1918, from decree of Dist. Judge, Budaun.

Pre-emption—Price—Payment of—Prompt payment of purchase-money is presumed—Time for payment can be extended for sufficient reasons—Special term in decree should be embodied.

In a pre-emption suit the plaintiff is presumed to be ready and willing to pay the purchase-money whenever he can get possession of the property. If for any special reason a plaintiff in pre-emption wants to have a more extended time, he should instruct his pleader to ask the Court to make a special term in the decree and to give the Court good reasons for giving an extended time.

[P 372 C 2]

*Peary Lal Banerji—for Appellant.**Lakshmi Narain—for Respondents.*

Judgment.—In this case the plaintiff brought a suit for pre-emption. The property was sold on 5th March 1914. The consideration stated was a sum of Rupees 4,500, which both the Courts below have found to be the true consideration. The present suit was not instituted until 28th January 1915, when the plaintiff alleged, amongst other things, that the sale price was only Rs. 2,731. The Court of first instance granted a decree upon payment of the price within one month. Just as that time was about to expire an application was made to the Court to extend the time. The Court intimated that it had no power to change the terms of the decree. Thereupon the plaintiff filed an appeal abandoning his allegation about the excess of the purchase-money save to the extent of Rs. 333. After the plaintiff appealed the vendee also appealed. Both appeals came up and were dismissed. The Court below refused to alter the de-

creed of the Court of first instance with regard to the time within which the money should be brought in. In order to justify the Court in altering the decree of the Court of first instance, the lower appellate Court would have to find that one month was an unreasonable time for the Court to fix in its decree for the payment of the money. Considering that the plaintiff had over eleven months to prepare himself for payment of the purchase-money, we can hardly say that a month was an unreasonable time. In a pre-emption suit the plaintiff is presumed to be ready and willing to pay the purchase-money whenever he can get possession of the property. If for any special reasons a plaintiff in pre-emption wants to have a more extended time, he should instruct his pleader to ask the Court to make a special term in the decree and to give the Court good reasons for giving an extended time. Nothing of this appears to have been done in the present case. We think there is no force in the appeal and we accordingly dismiss it with costs.

V.B./R.K.

*Appeal dismissed.***A. I. R. 1918 Allahabad 374 (2)**

BANERJI, J.

Bhikam Singh and others — Applicants.

v.

Emperor—Opposite party.

Criminal Revn. No. 626 of 1917, Decided on 22nd September 1917, from order of Dist. Magistrate, Agra.

Penal Code (1860), S. 448—Decree-holder attaching cattle of judgment-debtor in third person's house under process in execution does not commit any offence.

A decree-holder took out process for execution of the decree and attached certain cattle belonging to the judgment-debtor in the house of a third person:

Held: that the decree-holder was not guilty of any offence. [P 375 C 1]

*J. M. Banerji—for Applicants.**R. Malcomson—for the Crown.*

Judgment.—The applicants have been convicted under Ss. 323 and 448, I. P. C. So far as the conviction under S. 323 is concerned, it cannot upon the findings be questioned in this case and it must be maintained. As regards the conviction under S. 448, I do not think that the applicants were guilty of criminal trespass. Phul Singh and Lal Singh obtained a decree against one Bhara from the Court of Small Causes. This decree they transferred to Bhikam Singh. Process was taken out

for execution of the decree and some cattle were to be attached as the property of Bhara. The applicants went with the civil Court amin for the purpose of attaching the cattle. They were asked by the amin to bring out the cattle and they did so. The cattle were apparently in the house of the complainant Gobind Singh. It has not been found that the cattle did not belong to Bhara. On the contrary I am informed that a civil Court has held that they did belong to Bhara and had been properly attached as his property. Anyhow it not having been proved that the cattle belonged to Gobind Singh, the decree-holder and his supporters were justified in having the cattle seized. It cannot be said that in taking the cattle out of the complainant's house where they had been kept, the applicants were guilty of criminal trespass. The conviction under that section cannot, in my opinion, be supported. The result is that I set aside the conviction under that section, acquit the applicants of an offence under that section and direct that their bail bond be cancelled. The conviction under S. 323 and the sentence passed under that section are maintained.

V.B./R.K.

*Order modified.***A. I. R. 1918 Allahabad 375**

BANERJI AND RYVES, JJ.

Mahomed Abdul Aziz — Plaintiff — Appellant.

v.

Mahomed Abdul Jalil — Defendant — Respondent.

Letters Patent Appeal No. 125 of 1916, Decided on 30th July 1917, from decision of Knox, J., D/- 5th May 1916, in Second Appeal No. 122 of 1916.

Civil P. C (1908), O. 13, R. 10, and O. 41, R. 23—Application under O. 13, R. 10, to send for patwari's record summarily rejected and suit dismissed—Suit held not properly tried

In a suit by one cosharer against another cosharer for settlement of accounts under S. 165, Agra Tenancy Act, the defendant failed to produce his accounts. The plaintiff then applied to the Court under R. 10, O. 13, to send for the patwari's records and to appoint a Commissioner to prepare a statement of the collections made by the defendant after examining the records. The plaintiff stated in the application that duly authenticated copies of the records could not be obtained without unreasonable delay and expense. The Court rejected the application summarily and ultimately dismissed the suit:

Held: that the suit had not been properly tried and should be remanded to the First Court for trial according to law.

[P 876 C 1]

G. P. Boys and *S. A. Haidar*—for Appellant.

Judgment.—This and the connected appeals arise out of ten suits brought by the plaintiff-appellant under S. 165, Agra Tenancy Act, for settlement of accounts, the plaintiff being one of the cosharers and the defendant being a cosharer who had collected the profits. Five of the suits were filed so far back as 1907. In those suits the plaint was rejected by the Court of first instance, but upon an application for revision to the Board of Revenue the order of the Court of first instance was set aside and the cases were remanded to that Court for trial. In all the ten cases the defendant was called upon to produce the accounts of the collections admittedly made by him. Repeated orders were made for the production of the accounts but they were never complied with. Under the circumstances very slight evidence would have been sufficient to prove the plaintiff's claim. The plaintiff, having repeatedly failed to obtain from the defendant the accounts of the collections admittedly made by the defendant, had to give some prima facie evidence of the amounts so collected. It appears that he made an application to the Court asking that the patwari's records (that is the *siahas*), in which the amounts realized by the defendant were entered and in which the gross rental was to be found, should be examined by a Commissioner and a statement prepared showing the amounts actually collected. The Court made an order to that effect and directed the Tahsildar to have a statement prepared.

It was reported by the Superintendent of the Collector's record room that this would entail an examination of a number of records relating to a number of villages, and that, therefore, the examination of the records in the manner suggested would be undesirable. Upon this report being received the Assistant Collector, before whom the suits were pending, rescinded his former order and on 3rd February 1915 made an order to the effect that the plaintiff should produce copies of extracts from the documents on which he relied. The plaintiff on 8th March 1915 made an application to the Court praying that the records might be sent for and upon their being received a Commissioner should be appointed to prepare a statement of the amounts

collected by the defendant. This application was made under the provisions of O. 13, R. 10, Civil P. C. That rule provides that the Court may send for records on its being satisfied that the records are material to the suit in which the application for the sending for of the records is made and that the applicant cannot without unreasonable delay or expense obtain duly authenticated copies of the records or a portion thereof. In the present case it was distinctly stated that the obtaining of copies would entail heavy expense and cause considerable delay. The Court did not consider these matters but simply refused to send for the records and ordered the plaintiff to produce copies. The plaintiff having been unable to do so, the suits were dismissed. Upon appeal the order of dismissal was affirmed, and second appeals to this Court were dismissed under O. 41, R. 11, Civil P. C.

We have examined the record in this case and have satisfied ourselves that there has been no proper trial of any of the ten suits from which the ten appeals before us arise. As we have already said, the Court did at first direct that the records should be examined and a statement of the amounts collected by the defendant should be prepared. The Court cancelled that order and when the plaintiff subsequently applied for sending for the records on the grounds we have already stated, the Court did not apply its mind to the matter alleged but summarily rejected the application. The result was that there was no proper trial of the suits and the plaintiff has been deprived of his share of the profits which the defendant admittedly collected. It was to a great extent due to the omission of the defendant to produce his accounts that the plaintiff was obliged to ask the Court to send for the records showing the amounts collected by the defendant as entered by the patwari in his accounts. We are of opinion that the cases not having been properly tried should go back to the Court of First Instance for trial. As regards five of the appeals, namely, Nos. 117, 118, 119, 120 and 125, it is contended on behalf of the respondent that the Board of Revenue was not competent to entertain an application for revision in any of these cases and its order remanding the cases to the Court of First Instance was ultra vires

and reliance is placed for this contention on S. 185, Agra Tenancy Act and on the ruling of this Court in *Mt. Naraini v. Mt. Parsanni* (1). In the later case of *Thakur Damber Singh v. Sri Kishun Das* (2) it was observed by the learned Judge that the ruling last referred to must be taken to have been overruled by the decision of the Full Bench in *Zohra v. Mangu Lal* (3). That being so, we think that the Board of Revenue had jurisdiction to entertain the applications for revision presented to it in these five cases. We accordingly allow these appeals, set aside the decrees of this Court and of the Courts below and remand the cases to the Court of first instance under O. 41, R. 23, Civil P. C. through the District Judge, with directions to readmit the suits under their original numbers in the register and to try and dispose of them according to law. Costs here and hitherto will be costs in the cause.

V.B./R.K.

Case remanded.

1. (1905) 2 A L J 331.

2. (1909) 31 All 445=2 I C 377.

3. (1906) 28 All 753.

A. I. R. 1918 Allahabad 376

RICHARDS, C. J. AND TUDBALL, J.

Mahomed Raziuddin—Plaintiff—Appellant.

v.

Raghubir Prasad and others—Defendants—Respondents.

Second Appeal No. 1227 of 1916, Decided on 2nd May 1918, from a decree of Dist. Judge, Benares.

Mahomedan Law—Pre-emption—More than two cosharers—Right to pre-empt does not exist—Custom—Entry in Wajibularz held too vague.

There is no right of pre-emption among Shias where there are more than two cosharers in the property sold. [P 377 C 1]

In a pre-emption suit in which the vendor and the plaintiff were both Shias, the plaintiff alleged in the plaint that there was a custom under which he, as a cosharer with the vendor, was entitled to a right of pre-emption. The evidence in support of a custom was an extract from the wajibularz, which simply stated that in matters of pre-emption the rights were according to faith.

Held : that the entry was too vague to prove a custom of pre-emption in a case where the parties were Shias and there were several cosharers in the property sold. [P 377 C 1]

S. A. Haidar—for Appellant.

S. M. Sulaiman, Iqbal Ahmad and Mukhtar Ahmed—for Respondents.

Richards, C. J.—This appeal arises out of a suit for pre-emption. The ven-

dor was a Mahomaden of the Shia sect. The plaintiff alleged in the plaint that there was a custom under which he, as a cosharer with the vendor, was entitled to a right of pre-emption. The evidence in support of a custom was an extract from the wajibularz, which simply stated that in matter of pre-emption the rights were according to faith. This is certainly a very vague entry. As a matter of fact the vendor and the pre-emptor are Shias and the best view of the law of pre-emption amongst Shias is that there is no right where there are more than two cosharers. No doubt there is considerable authority the other way, but the best view appears to be that amongst Shias there is no right of pre-emption where there are more than two cosharers. In the present case there are more than two cosharers and it was upon this ground that the Court below dismissed the suit. In my opinion the plaintiff by the production of this vague entry from the wajibularz did not prove the existence of a custom which entitled him as a cosharer, to purchase zamindari which was sold by another Shamerely upon the ground that he was a cosharer, where it is admitted there were several other cosharers. I think that the decision of the Court below should be affirmed, and I would dismiss the appeal.

Tudball, J—I fully agree. The ruling in *Abbas Ali v. Maya Ram* (1) has been consistently followed in this Court for a long series of years.

By the Court—The order of the Court is that we dismiss the appeal with costs.
V.B./R.K. *Appeal dismissed.*

1. (1890) 12 All 229.

A. I. R. 1918 Allahabad 377

PIGGOTT AND WALSH, JJ.

Man Singh—Petitioner.

v.

Mt. Gaini—Opposite Party.

Civil Misc. Ref. No. 186 of 1917, Decided on 2nd November 1917, from Secy. to Govt., U. P., Naini Tal, D/- 21st May 1917

(a) Hindu Law—Alienation—Father—Alienation for antecedent debt binds son.

An alienation of joint ancestral property by a Hindu father, in order to satisfy an antecedent debt binding on him and which would be the son's pious duty to pay, is binding on the son.

[P 377 C 2]

(b) Hindu Law—Alienation—Father leper can alienate so as to bind son provided alienation is for legal necessity.

There is no principle of Hindu law under

which a person who contracts the disease of leprosy is thereby disqualified from dealing with his own property or from dealing with joint family property so as to bind his sons, provided the alienation is made for legal necessity.

[P 377 C 2]

Lakshmi Narain—for Petitioner.

S. D. Sinha—for Opposite Party.

Judgment.—This is a reference by the Local Government under R. 17 of the rules and orders relating to the Kumaun Division. The suit in question was brought to set aside an alienation made by the father of the minor plaintiff of certain property which was admittedly the joint ancestral property of the minor and his father. There is a concurrent finding by the Court of First Instance and by the Court of First Appeal to the effect that the alienation in question was made for legal necessity. There was an antecedent debt binding on the father, which it is the son's pious duty to satisfy, and under these circumstances an alienation by the father, even of joint ancestral property, would be binding on the son. There was a second appeal to the Court of the Commissioner of Kumaun and there the case took an entirely different turn. The learned Commissioner has not dissented from the finding that the alienation in question was made for legal necessity. He has taken up a plea, which was certainly suggested in the plaint as what may be called an alternative line of attack, to the effect that the alienation was invalid because the father Sobha was suffering from leprosy. The question before the Court had nothing to do with the right of a person suffering from leprosy or similar incurable disease to inherit property: the property was the father's and had come to him from his ancestors. We have not been referred to any principle of Hindu law, nor do we find that any such principle exists, under which a person who contracts the disease of leprosy is thereby disqualified from dealing with his own property or from dealing with joint family property so as to bind his sons, provided the alienation of the same is made for legal necessity.

The Commissioner's order suggests an opinion on his part that, whatever may be the general Hindu law, on the subject there is a custom prevalent in the Kumaun division, and binding on the parties which disqualifies a leper from dealing with his property. He refers to a decision of one of his predecessors in the year

1887, in which a somewhat anomalous principle is laid down that a leper has only a life-interest in any property belonging to him, that he can alienate that property for his lifetime but cannot make any alienation binding upon his heirs or successors after his death. We do not find from an examination of the record that any local custom to this effect was pleaded, much less was established by evidence. The decision therefore, seems to rest simply upon a pronouncement of the Kumaun High Court in the order of 1887, which may or may not have rested upon adequate evidence in that particular case, but which cannot be regarded as laying down a proposition of law binding upon the parties concerned in any future litigation. In the course of argument before us a suggestion has been thrown out that the order of the Commissioner might be supported, not on the ground on which it proceeds, but on the strength of certain remarks made in the concluding portion of the Commissioner's judgment. It is there stated that this man Sobha had left his home and was living as an outcast and leper on the banks of the Ganges. A man suffering from a virulent type of leprosy would naturally leave his home and take up his residence somewhere outside his village. It does not seem to have formed any part of the plaintiff's case in the Courts below that Sobha had renounced the world and had adopted the life and status of a Hindu ascetic. The fact that he executed the sale deed in suit in satisfaction of a debt previously contracted by him shows in itself that he retained an interest in mundane affairs and did not consider himself to have renounced all his rights to his property. We do not think that the order of the Commissioner can be supported upon this or upon any other ground. Our answer, therefore to this reference is that in our opinion the Commissioner should have dismissed the second appeal preferred to his Court, and that the costs of the entire proceedings, including this reference, should be borne by the unsuccessful plaintiff. The petitioner, that is to say, the original defendant in the suit, should be allowed to charge pleader's fee in this Court at the rate actually certified.

V.B./R.K.

*Answer accordingly.***A. I. R. 1918 Allahabad 378**

RYVES, J.

Ghasi—Applicant.

v.

Emperor—Opposite Party.

Criminal Ref. No. 581 of 1917. Decided on 23rd July 1917, made by Sess. Judge, Moradabad.

(a) Penal Code (1860), S. 441—Entry by agent under orders is sufficient.

In order to constitute criminal trespass it is not necessary that the entry on the land should be personally effected by the accused. It might well be an entry by an agent of his under his orders. [P 379 C 1]

(b) Penal Code (1860), S. 441—Trespass by agent—Person getting people to build on another's land is guilty.

A person who gets people to build on land belonging to another even if he does not personally set foot on that land is guilty of criminal trespass within the meaning of S. 441, I. P. C. [P 378 C 2]

Judgment.—This is a reference by the learned Sessions Judge of Moradabad recommending that the conviction of one Ghasi under S. 441, I. P. C. and the sentence of a fine imposed thereunder should be set aside. Ghasi was tried by a Bench of Honorary Magistrates and convicted and sentenced to pay a fine of Rs. 100. He appealed to the District Magistrate who dismissed the appeal. The matter was then taken in revision before the learned Sessions Judge, who has sent up the record with a recommendation for setting aside the conviction and sentence passed on Ghasi. In my opinion the facts as found by the learned District Magistrate in his judgment in appeal show that Ghasi was guilty of criminal trespass. The learned Sessions Judge says:

"In this case there is no evidence to show that the applicant Ghasi had entered upon the complainants' land with criminal intent or that he had entered at all. Mere building of houses on another person's land in my opinion does not amount to criminal trespass. . . . A person might build a house on another man's land without even entering on the land and in such a case I do not see how he can be said to be guilty of criminal trespass."

I do not agree with this proposition of law. It has been found by the District Magistrate on evidence that Ghasi bought a particular piece of land and began building on it and then subsequently and in spite of warnings insisted on building on another separate piece of land the property of the complainant. It seems to me that even if he did not personally set foot on the land of the complainant, if he got people to build on it in spite of the protests of the complainant, that he did

commit criminal trespass within the meaning of S. 441, I. P. C. I do not think it is necessary that the entry on such land should be personally effected by the accused. It might well be an entry by an agent of his under his orders. I decline to interfere. Let the record be returned.

V.B./R.K. *Record returned.*

A. I. R. 1918 Allahabad 379

RICHARDS, C. J. AND BANERJI, J.

Ram Richcha Prasad Tewari and others—Defendants—Appellants.

v.

Raghunath Prasad Tewari and others—Plaintiffs—Respondents.

Second Appeal No. 1760 of 1916, Decided on 9th May 1918, from a decree of Dist. Judge, Gorakhpur.

Contract Act (9 of 1872), S. 69—Sale of mortgaged property—Vendee retaining part of consideration to pay off mortgage—Suit for pre-emption—Pre-emptor directed to deposit full consideration—Vendee withdrawing deposit—Failure of vendee to discharge mortgage—Mortgage paid off by pre-emptor—Suit by pre-emptor to recover mortgage amount from vendee is not maintainable.

Certain property which was under mortgage was sold to the defendant, and a part of the consideration was left in his hands to pay off the mortgage. Plaintiff brought a suit for pre-emption in respect of the property and obtained a decree which directed him to deposit the full sale price in Court. The whole of the money was withdrawn by the defendant who never discharged the mortgage or any part of it. The mortgagee brought a suit to recover the mortgage amount and the plaintiff paid it in order to save the property. The plaintiff then brought a suit to recover the amount paid by him from the defendant:

Held: that the suit was not maintainable as there was no contractual liability between the plaintiff and defendant nor were the provisions of S. 69, applicable to the case. [P 379 O 2]

S. M. Sulaiman—for Appellants.

Surendra Nath Sen—for Respondents.

Judgment.—This appeal arises under the following circumstances. Certain property which was subject to a mortgage was sold. The vendor left in the hands of the vendee a portion of the consideration which was to go in discharge of a mortgage. A suit was brought by the plaintiffs for pre-emption of the property sold and a decree was obtained. Very unfortunately the decree directed that the plaintiffs should pay into Court as a condition precedent to getting the property the whole of the purchase money. The plaintiff ought not to have been asked to pay the entire price. He ought to have been

only directed to pay in the amount of cash which the vendee had paid to the vendor retaining in his hands the balance of the purchase-money for payment of the mortgagee just in the same way as the original vendee was to retain part of the purchase-money. The plaintiffs paid into Court the full purchase money and got possession of the property. The defendants' predecessors drew out of Court the full amount deposited by the plaintiffs but never discharged the mortgage or any part of it. Later on a suit was brought by the mortgagee and the plaintiffs in order to save the property had to pay the mortgage money. They then instituted the present suit to recover from the defendants the money left in the hands of the vendee for payment to the mortgagee together with interest. The Court of first instance dismissed the suit.

The lower appellate Court has decreed the suit. Hence the present appeal by the defendants. We should have been very glad to have seen our way to uphold the decree of the Court below, because there can be no doubt that the defendants have kept in their hands money which clearly they should have paid to the mortgagee. But the question is upon what basis can the plaintiffs succeed. The defendants or their predecessors-in-title never entered into any contract with the present plaintiffs to pay the money to the mortgagee. Even the mortgagee himself could not have recovered this money from the defendants. The obligation of the defendants' predecessor-in-title was one based on his contract with the original vendor. The whole trouble arose from the plaintiffs not taking care that the pre-emption decree was drawn up in proper form directing that they should only pay the amount which the defendants' predecessor-in-title had paid to his vendor. We consider that under the circumstances of the present case there was no contractual liability between the present plaintiffs and the defendants. Nor was there that liability which the law implies under certain circumstances for instance where one man is compelled to pay money for which another is legally liable. S. 69, on which the Court below relies clearly is not applicable to the circumstances of the present case. We must allow the appeal, set aside the decree of the Court below and restore the decree of the Court of first instance with this modification that we

direct the parties to pay their own costs throughout.

V.B./R.K.

Appeal decreed.

A. I. R. 1918 Allahabad 380

TUDBALL, J.

Durga Prasad and another—Decree-holders—Appellants.

v.

Shambhu—Judgment-debtor—Respondent.

Execution Second Appeal No. 688 of 1917, Decided on 20th November 1917, against decision of Sub-Judge, Meerut, D/- 23rd March 1917.

Civil P. C. (1908), S. 60 (f)—Birt jijmani is right to personal service and is exempt from attachment.

Birt jijmani is a right to personal service within the meaning of Cl. (f), S. 60, and is therefore exempt from attachment and sale in execution of a decree, notwithstanding that in the eyes of Hindu law such a right is immovable property. [P 380 C 1, 2]

S. N. Sen—for Appellants.

K. N. Katju—for Respondent.

Judgment. — This is an execution second appeal. The facts are simple. A simple money decree was obtained by the appellant against the respondent. In execution of that decree he has applied for the attachment and sale of what is commonly known as birt jijmani. The Court of first instance allowed the application. The lower appellate Court has disallowed the application holding that such a right is not attachable and cannot be sold in execution of a decree. The decree-holder appeals. On his behalf it is urged, and for the purposes of this decision it may be assumed to be correct, that in the eyes of Hindu law birt jijmani is immovable property. Attention has been called to the decisions in *Sukh Lal v. Bishambhar* (1), *Raghoo Pandey v. Kassy Parey* (2), *Krishnabhat v. Kapabhat* (3), *Balvantrav v. Purshotam Sidheshvar* (4). In all these cases, which are cases of voluntary transfers of birt jijmani or birt mahabrahmani, it was held that this right was immovable property in the eyes of the Hindu law, though it is not properly under any other system of law. This argument does not dispose of the case. As I have said above, it may be assumed to be quite correct. On behalf of the judgment-debtor it is pointed out

that it has been held by this Court and also by the Bombay High Court in more than one case that this right is really a right of personal service and as such it is property which cannot be attached and sold in view of the provisions of S. 60, Cl. (f), Civil P. C., which corresponds with S. 266 of the former Code. In this Court it was held in *Durga Prasad v. Genda* (5), that birt mahabrahmani was a right of personal service of the character mentioned in S. 266 (f) Civil P. C., and as such was not liable to attachment or sale.

There is no decision to the contrary either of this Court, or any other Court, as far as I am aware and my attention has not been called to any such contrary decision. The Bombay decisions are to be found in *Ganesh Ramchandra Dat v. Shankar Ramchandra* (6), *Govind Lakshman Joshi v. Ramkrishna Hari Joshi* (7), and *Rajaram v. Ganesh* (8). These were all cases of what is called in the Bombay Presidency "watti," which is a right similar to the one which is in dispute in the present case. The judgment of Ranade, J., discusses numerous decisions on the point, showing that at no time has a compulsory sale of right of this description ever been allowed, and the reasons for this. In each of these cases it is distinctly held, and I must say I agree with the finding, that this right is a right of personal service and nothing more and nothing less. The Hindu law may have classified it as immovable property. That does not affect S. 60, Civil P. C., which in clear terms lays down a list of certain properties which are not liable to attachment or sale and in that list there is Cl. (f), "any right of personal service." In my opinion the decision of the Court below was quite correct. The property which the appellant was seeking to attach is property which is exempt by the law from attachment and sale.

The appeal therefore fails and is dismissed with costs, including fees on the higher scale.

V.B./R.K. *Appeal dismissed.*

5. (1889) A W N 169

6. (1886) 10 Bom 395.

7. (1888) 12 Bom 366.

8. (1899) 23 Bom 131.

1. (1917) 39 All 196=37 I C 661.

2. (1884) 10 Cal 73.

3. (1869) 6 B H C R A C 137.

4. (1872) 9 B H C R 99.

A. I. R. 1918 Allahabad 381 (1)

BANERJI, J.

Bhagwan Din—Accused.

v.

Mahmud Ali—Complainant.

Criminal Ref. No. 184 of 1918, Decided on 22nd March 1918, made by Dist. Magistrate, Banda.

Workmen's Compensation Act (1859), S. 1—Dealer in stones is not artificer, workman or labourer and agreement to supply stones does not come under the Act.

Accused who dealt in stones took an advance from the complainant under an agreement to supply the latter with stones from time to time according to the terms of an agreement entered into between the parties. Accused failed to supply the stones and complainant made an application under the Workmen's Breach of Contract Act:

Held: that the contract was not a contract by an artificer, workman or labourer nor was the money advanced on account of work to be performed by an artificer, Workman or labourer and that therefore the provisions of the Workmen's Breach of Contract Act had no application to the case. [P 381 C 1 2]

Judgment.—*Bhagwan Din* is alleged to have taken an advance of Rs. 20 from *Mahmud Ali*, upon an agreement to supply him with certain stones from time to time according to the terms of a contract entered into by him with *Mahmud Ali*. He having failed to supply the stones, an application was made to a Magistrate under Act 13 of 1859 and the Magistrate made an order against *Bhagwan Din*. The learned District Magistrate is of opinion that the Act did not apply to a case like the present and has accordingly referred it to this Court with the recommendation that the order of the Magistrate be set aside. I agree with the view taken by the learned District Magistrate. The Act, as the preamble shows, is an Act for the granting of relief for fraudulent breach of contract on the part of artificers, workmen and labourers who have received money in advance on account of work which they have contracted to perform. S. 1 of the Act clearly shows that it applies to cases where an artificer, workman or labourer has received money from a master or employer and has wilfully and without lawful or reasonable excuse neglected or refused to perform or get performed any work which he has contracted to perform or get performed. In the present case the contract was not a contract by an artificer, workman or labourer. The money was not advanced on account of work to be performed by an artificer, workman or labourer, and the person by

whom the money was advanced was not his master or employer. The present case was that of an ordinary contract by a person who dealt in stones to supply certain stones to another person. The Act has, therefore, no application in a case of this kind and the learned Magistrate who tried the case was, in my opinion, wrong in holding the Act to be applicable. I accept the recommendation of the learned District Magistrate and set aside the order of the Magistrate of the First Class, dated 26th November 1917. Any sum which may have been paid in pursuance of the said order should be refunded.

V. B. / R. K.

*Order set aside.***A. I. R. 1918 Allahabad 381 (2)**

RICHARDS, C. J. AND TUDBALL, J.

Makhan Singh—Defendant-Appellant.

v.

Jahan Kuar and another—Plaintiffs—Respondents.

Second Appeal No. 275 of 1917, Decided on 8th May 1918, from decree of Dist. Judge, Mainpuri.

Pre-emption—Price—Consideration in sale-deed should be taken as true—Price excessive—Burden of proof is shifted—Property worth amount stated in sale-deed—Details of consideration need not be proved.

In a pre-emption suit, *prima facie* the consideration in the sale deed is to be taken as the true consideration. Where however the plaintiff shows that the price is a very excessive one, he can shift the onus on to the vendee of showing that the consideration stated in the deed was actually given. [P 382 C 1]

Where it is found that property is worth fully the amount stated in the sale-deed, the vendee is not bound to prove all the details of the consideration. [P 382 C 1]

Surendra Nath Sen—for Appellant.*Sham Krishna Dar*—for Respondents.

Judgment.—This appeal arises out of a suit for pre-emption. The first Court granted a decree on payment of Rs. 88. The lower appellate Court confirmed this decree. The vendees appealed. The first point taken is that the custom is not proved as giving a right to the plaintiffs. We consider that the Courts below were justified in holding that the plaintiffs had a right of pre-emption. The next point is the question of consideration. The consideration stated in the sale-deed is Rs. 2,000. The plaintiffs' own witness admitted that the property was worth Rs. 2,400 and there can be no doubt that the property was worth at least Rupees 2,000. It is very difficult to understand how the Courts below came to give th

plaintiffs a decree conditional upon payment of Rs. 88 only. Prima facie the consideration in the sale-deed is to be taken as the true consideration. No doubt where the plaintiff shows that the price is a very excessive price, he can shift the onus on to the vendee of showing that the consideration stated in the deed was actually given. To all intents and purposes if Rs. 88 was the actual sum paid in the present case, the transaction was a gift, in which case there would be no right of pre-emption at all.

What the Courts below have really done is to throw the onus upon the vendee of proving all the details of the consideration, and this notwithstanding that the property is worth fully the amount stated in the sale-deed. The Courts below appear to have treated the plaintiffs as if they were reversioners suing to set aside a sale-deed made by another Hindu female. We do not think that the Court was justified in treating a suit for pre-emption in this way. If the reversioners think fit to challenge the alienation by the vendor in the present case they can do so, but in the present pre-emption suit we think the plaintiffs must pay the consideration stated in the sale deed. We accordingly vary the decree of the Court below by substituting the sum of Rupees 2,000 for the sum of Rs. 88. This sum must be paid on or before 8th August next. If the sum is not paid within this time the suit will stand dismissed with costs in all Courts. In any event the appellant will get his costs of this appeal.

V.B./R.K. *Decree varied.*

A. I. R. 1918 Allahabad 382 (1)

RICHARDS, C. J. AND BANERJI, J.

Kallu and another—Defendants—Appellants.

Kallu Singh and others—Plaintiffs—Respondents.

Second Appeal No. 1541 of 1917, Decided on 18th January 1917.

Wajib-ul-arz—Entry in—Extract from **wajib-ul-arz** recording custom of pre-emption is prima facie proof of its existence.

An extract from a **wajib-ul-arz** recording a custom of pre-emption is prima facie evidence of the existence of the custom, and it is unnecessary for the plaintiff to give instances in support of the entry, but the defendant in such a case is entitled to give evidence to show that no custom of pre-emption exists. [P 382 C 2]

M. L. Agarwala—for Appellants.

Judgment.—The learned Additional Judge says:

"The copy of a **wajib-ul-arz** filed by the plaintiff shows that there is a custom of pre-emption in the village Dullakheri. The ruling reported as *Kanwar Digambar Singh v. Kanwar Ahmed Sayeed Khan* (1) goes to show that the **wajib-ul-arz** is a prima facie evidence of custom and it requires no other evidence to corroborate it."

There is no doubt that the extract from a **wajib-ul-arz** recording a custom of pre-emption is prima facie evidence of the existence of the custom, and it is quite true that their Lordships of the Privy Council in the case referred to say that it is unnecessary for the plaintiff to give instances in support of the entry. This does not, however, mean that the defendant is not entitled to give evidence to show that no custom prevails in a case in which the plaintiff has prima facie proved his case by the production of an extract from the **wajib-ul-arz**. In our opinion the defendant is entitled to give evidence; and if he can show that there have been a number of sales to strangers, the Court is bound to take this evidence into consideration together with the rest of the evidence in making up its mind whether or not a custom of pre-emption exists. We have read the judgment of the first Court and that judgment read in conjunction with the judgment of the lower appellate Court seems to us to show that the decree was correct. We therefore, dismiss the appeal.

V.B./R.K. *Appeal dismissed.*

1. A I R 1914 P C 11=37 All 129=28 I C 34=42 I A 10 (P C).

A. I. R. 1918 Allahabad 382 (2)

PIGGOTT, J.

Ganga Ram—Petitioner.

v.

Emperor—Opposite Party.

Civil Revn. No. 88 of 1917, Decided on 8th August 1917, against order of Munsif, Bisauli, D/- 24th March 1917.

Criminal P. C. (1898), Ss. 476 and 195—Provisions of S. 476 are complete—Offence of kind referred to in S. 195 either committed before Court or brought to its notice—S. 476 applies.

The provisions of S. 476, Criminal P. C., are complete as they stand, and it is sufficient to bring those provisions into operation, if the offence in question be one of the kind referred to in S. 195 of the Code and if it be either committed before the Court which takes action under S. 476 or brought under the notice of that Court in the course of a judicial proceeding.

[P 383 C 2]

Satya Chander Mukerji and Panna Lal—for Petitioner.

W. Wallach—for the Crown.

Judgment.—These are two applications which come before the Court under the following circumstances. There was a litigation going on in the Court of a Munsif of Bisauli, in which one of the parties was seeking to establish the proposition that a certain house had at one time belonged to one Ganga Ram. As a piece of evidence bearing on this question he undertook to prove to the Court that Ganga Ram had granted a ten years' lease of this house in favour of one Tulshi Ram since deceased. It was said that Tulshi Ram had executed on stamp paper an agreement to hold this house as tenant of Ganga Ram at a certain rent. Summons was issued to Ganga Ram calling upon him to produce this document. He appeared in Court in obedience to the summons, tendered in evidence an agreement of the nature suggested, purporting to have been executed in his favour by Tulshi Ram deceased as long ago as the year 1895. He gave evidence on oath supporting the contract of lease in question and the genuineness of the document. A marginal witness to the said document named Nathu Lal was also called and examined by the Court and he gave evidence in support of the genuineness of the document. The learned Munsif came to the conclusion that the document in question was a forgery, that there never had been any such contract of lease, that it was proved by evidence that Tulshi Ram had never occupied the premises in question, that the appearance of the document was in itself suspicious and that if the transaction had been a genuine one, the document would have been registered, which it was not. He issued notice to Ganga Ram and Nathu Lal as well as to two other persons, with whose case I am not now concerned, to show cause why their prosecution should not be ordered under the provisions of S. 476, Criminal P. C., and in the result he has ordered the prosecution of Ganga Ram in respect of offences punishable under Ss. 193 and 471, I. P. C., and of Nathu Lal in respect of offences under Ss. 193 and 471/109 of the same Code. The applications before me are in revision by Ganga Ram and by Nathu Lal against the said order.

The principal point taken is that the provisions of S. 476, Criminal P. C., must be regarded as governed by those of S. 195 of the same Code, in such a

manner that an offence, for instance, of using as genuine a forged document, punishable under S. 471, I. P. C., would not fall within the purview of S. 476 unless it had been committed by a party to the proceeding pending before the Court at the time when the offence in question was brought under the notice of that Court. There is authority for that proposition in the case of *Jadunandan Singh v. Emperor* (1). I am informed that there has been a decision of the Madras High Court to the same effect and one of the Bombay High Court to a contrary effect. With all respect to the learned Judges who have taken a different view, I have little doubt that the provisions of S. 476, Criminal P. C., are complete as they stand, and that it is sufficient to bring those provisions into operation if the offence in question be one of the kind referred to in S. 195, Criminal P. C., and if it be either committed before the Court which takes action under S. 476, or brought under notice of that Court in the course of a judicial proceeding. So far as the cases now before me are concerned, however, this is of purely academical interest.

The learned Munsif was of opinion that Ganga Ram and Nathu Lal had intentionally given false evidence before him in the course of a judicial proceeding and he was entitled to direct their prosecution for the said offence. He saw reason to suspect that these two men had also committed some further offence punishable under S. 471, I. P. C., or had abetted the commission of some such offence, in connexion with the document about which they gave evidence. Now as Ganga Ram and Nathu Lal were not parties to the suit pending in the Court of the Munsif when this document was produced in evidence, there is nothing in the provisions of S. 195, Criminal P. C., to prevent the Magistrate from taking cognizance of the alleged commission by either of these men of the offences above referred to, if he finds upon enquiry that the evidence laid before him disclosed the commission of such offence or offences. That portion therefore of the order of the learned Munsif which directed the prosecution of these two men in respect of an offence under S. 471 or 471/109, I. P. C., was really superfluous.

1. (1910) 37 Cal 250=4 I C 710.

I have been asked further to consider the question whether the facts disclosed by the order of the learned Munsif are sufficient to warrant the conclusion that Ganga Ram, when he produced this document in Court in obedience to a summons, was fraudulently or dishonestly using that document within the meaning of S. 471, I. P. C. I think it sufficient to say that this is a point which will require careful consideration by the trying Magistrate, and the decision of which may depend on the nature of the evidence produced by the prosecution. One possible view of the case is that whatever offence punishable under S. 471, I. P. C., was committed in the present case, was committed by that party to the suit who caused the production of this document by obtaining the issue of process against Ganga Ram, and that the matter to be considered by the trying Magistrate will be whether there is reason to suppose that Ganga Ram or Nathu Lal, or either of them, abetted the commission of that offence. Further than this it is impossible for me to deal with the point on the facts now before me. I find no reason in law for holding that the orders complained of were outside the jurisdiction of the Court below and, in my opinion, they were well within the discretion of that Court and call for no interference. I dismiss both these applications with costs. The learned Government Advocate who has appeared to oppose the applications will be entitled to charge as costs the fee actually received by him.

V.B./R.K. *Application dismissed.*

A. I. R. 1918 Allahabad 384 (1)

RICHARDS, C. J. AND BANERJI, J.

Ganges Flour Mills Ltd.—Judgment-debtors—Appellants.

v.

Shadi Ram and another—Auction-purchaser and Decree-holders—Respondents.

First Appeal No. 124 of 1917, Decided on 15th December 1917, from order of Small Cause Court Judge, Cawnpore, D/- 13th June 1917.

Civil P. C. (1908), S. 64—Order staying sale set aside on ground of fraud—Sale held during existence of order is valid.

Where an order staying an execution sale is subsequently set aside on the ground of fraud, the effect is as if the order had never been made, so that a sale held during the existence of the order is a valid sale and cannot be set aside.

[P 384 C 2]

W. Wallach and P. L. Banerji—for Appellant.

B. E. O'Connor and Motilal Nehru—for Respondents.

Judgment.—In this case an order had been obtained from the High Court *ex parte*, staying an execution sale which was to take place on 10th April 1917 for a period of 14 days. The order was obtained from this Court on 5th April 1917. The sale in fact took place on 10th April, the day fixed for the sale. It was conducted by an auctioneer, who admittedly was justified in proceeding with the sale so far as he was concerned. He had got no proper intimation that this Court had postponed the sale. Even the Judge himself, under whose order the sale was held, did not know of the order of this Court until after the time advertised for the sale. When the copy of the order of this Court was filed in the Court of the Subordinate Judge the sale was actually taking place. The order which was obtained from this Court on 5th April was subsequently set aside by the same learned Judge who made the order, on the ground that the order had been obtained from him by fraud, misrepresentation and suppression of material facts. It seems to us therefore that the only question we have to decide is whether or not the sale was absolutely void because it was made while the order of this Court was still in existence. In our opinion the sale was not void. Once the order obtained in this Court was set aside as having been obtained by fraud, it was as if the order had never been made. If this order had never been made it is perfectly clear that the sale was a perfectly valid sale and could not be set aside on any ground of irregularity. This being so, we think the appeal must be dismissed with costs. Both sets of respondents were vitally interested in the appeal and there must be two sets of costs. Costs in this Court will include fees on the higher scale.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1918 Allahabad 384 (2)

RICHARDS, C. J. AND BANERJI, J.

Bhup Singh and others—Plaintiffs—Appellants.

v.

Jai Ram and others—Defendants—Respondents.

Second Appeal No. 904 of 1916, Decided on 25th April 1918,

(a) Agra Tenancy Act (2 of 1901), S. 22—Joint holding cultivated separately in small portions—Widow succeeding to portion—On her death nearest reversioners, cultivating other portions can be said to share in cultivation under S. 22 and are entitled to succeed—If not under S. 22 they are entitled to succeed under Hindu Law.

Each of several tenants of a joint holding was in separate possession of specific plots in the holding. On the death of one of them his widow continued to be in separate possession of that portion of the holding which the deceased had been in possession of during his lifetime. On the death of the widow the other tenants, who were the nearest reversioners of the deceased, claimed to succeed to the share of the deceased :

Held, (1) that although the plaintiffs did not share in the cultivation of the specific plots held by the deceased tenant, they did share in the cultivation of the holding in which he had an interest and that therefore they were entitled to succeed to his share under S. 22; [P 386 C 1]

(2) that if S. 22 did not apply to the case, the plaintiffs were entitled to succeed to the share of the deceased under the Hindu law. [P 386 C 1]

(b) Hindu Law—Succession—No Act interfering—Succession to Hindus is governed by Hindu Law.

When a Hindu dies the succession to his property is regulated by the ordinary rules of Hindu law, save so far as those rules have been modified by the provisions of some Act. [P 386 C 1]

B. E. O'Connor and Pannalal — for Appellants.

Baldev Ram Dave—for Respondents.

Judgment.—This appeal comes out of a suit in which the plaintiffs sought to recover certain shares in what they alleged to be an occupancy holding. A pedigree will be found in para. 6 of the plaint. The common ancestor was a man called Girdhari. He had a number of sons and amongst them one Durjan Singh. Durjan Singh had a son named Bhim Sen, who left a widow Mt. Jiwalia but no children. She died some 9 months ago before the present suit was instituted, and it is to recover a $\frac{3}{8}$ ths share of what Bhim Sen held in a certain holding (viz., one-fourth) that the present suit has been brought. One of the defendants Roshan Singh alleged that he had been adopted by Mt. Jiwalia with authority from Bhim Sen. It has been found by both the Courts below that this is not true and if the property was ordinary immovable property, the plaintiffs would undoubtedly have been entitled to succeed as the nearest reversioners. In the plaint the plaintiffs alleged that there was one large holding in two villages, that the descendants of Girdhari had remained in possession thereof but that it was still a joint holding, the rent of which was jointly

paid to the zamindar. Roshan Singh admitted that the holding in the two villages was entered in a joint khata as alleged in para. 2 but denied the rest of the paragraph. Para. 14 of the written statement is as follows :

"Although the whole khata is recorded as joint in papers yet all the persons are in separate possession of their shares in the cultivatory holding. The zamindar has admitted the contesting defendant to be in possession of the cultivatory holding and to be adopted son."

No issue was framed in either of the Courts below as to whether or not there was only one occupancy holding. But as we have shown, it was specifically alleged in the plaint that there was but one occupancy holding, that is to say, that all the lands in the two villages constituted one holding as between the landlord and the several persons who were entitled to the occupancy holding, and that the rent was a joint one. These allegations were certainly not specifically denied in the written statement of Roshan. It is admitted that the land is recorded as one holding and the papers on the record show that it is recorded as a holding at one joint rent. The old and the present patwari were also examined and their evidence goes to show that the holding is a joint holding, although the different persons in possession cultivated at different times separate portions. We hold that there was only one holding. We assume for the purposes of our decision that Bhim Sen was in separate possession during his lifetime of certain specific portions of the holding and that after his death Mt. Jiwalia continued to be in separate possession of that portion of the holding which Bhim Sen had been in possession of during his lifetime. We also accept, as we are bound to do, the finding of the Court below that the plaintiffs are the nearest reversioners and that Roshan Singh was not the adopted son of Bhim Sen. The question which we have to decide is, whether the plaintiffs were entitled to a decree under these circumstances. The first Court decided against the plaintiff, because it thought that Mt. Jiwalia, having come into possession before the passing of the Tenancy Act, had thereby acquired an absolute title to the portion of the occupancy holding in possession of which Bhim Sen was before his death. This is not clearly correct.

If Bhim Sen had been a sole tenant of an occupancy holding and died before the

passing of the Act, his widow would have succeeded him under the provisions of that Act but on her death the succession would be regulated by the provisions of the present Tenancy Act. The lower appellate Court decided against the plaintiffs, upon the ground that the plaintiffs being collateral heirs were not entitled because they did not share in the cultivation of the specific plots held by Bhim Sen and after his death by Mt. Jiwalia. When a Hindu dies the succession to his property is regulated by the ordinary rules of Hindu law, save so far as those rules have been modified by the provisions of some Act. The only provision which could prevent the plaintiffs being entitled to succeed upon the death of Mt. Jiwalia is S. 22 of the present Tenancy Act. S. 22 allows a collateral heir to succeed failing lineal descendants in the male line and other heirs as mentioned in the section. But it contains a proviso that no collateral relative shall be entitled to inherit who did not share in the cultivation of the holding at the time of the tenant's death. If this section applies at all to the circumstances of the present case, then it is clear that while the plaintiffs did not share in the cultivation of the specific plots held by Bhim Sen they did share in the cultivation of the "holding" in which Bhim Sen had an interest. "Holding" in the proviso clearly means holding as that expression is defined in the Tenancy Act. If we were asked to hold and did hold that S. 22 only applies while the question arises as to the succession of an entire occupancy holding, then, the section not applying to the circumstances of the present case, the ordinary rules of Hindu law would prevail and the plaintiffs would be entitled to succeed.

We allow the appeal, set aside the decrees of both the Courts below and give the plaintiffs a decree for possession of the share claimed. We send back the case to the Court of first instance directing it to make an enquiry as to mesne profits up to the time of the institution of the suit and also up to the date of delivery of possession as mentioned in O. 20, R. 12. The Court below will then make a final decree as to the amount of the profits. The respondents must pay the costs in all Courts including in this Court fees on the higher scale.

V.B./R.K.

Appeal allowed.**A. I. R. 1918 Allahabad 386**

BANERJI AND RYVES, JJ.

Wazir Ali and another—Defendants—Appellants.

v.

Ali Islam—Plaintiff—Respondent.

Second Appeal No. 1395 of 1916, D/- 2nd July 1918, from decree of Dist-Judge. Azamgarh, dated 24th August 1916.

Limitation Act (1908), Art. 148—Suit for redemption by purchaser of portion of equity of redemption against purchaser of another portion who has redeemed whole property, is governed by Art. 148—Co-mortgagor explained.

All persons who step into the shoes of the original mortgagor are co-mortgagors for all purposes. [P 387 C 1]

A suit by a purchaser of the equity of redemption in a part of the mortgaged property for redemption of his share of the property against a purchaser of another portion of the mortgaged property who has redeemed the whole of the property is governed by Art. 148, and the period of limitation is sixty years from the date on which the mortgage became capable of redemption.

[P 387 C 2]

The possession of a mortgagee must be deemed to be that of the person entitled to the equity of redemption. [P 387 C 1,2]

M. L. Agarwala, S. M. Sulaiman, Tej Bahadur Sapru and Surendra Nath Sen—for Appellants.

Gokul Prasad—for Respondent.

Judgment.—This appeal arises out of a suit for redemption brought under the circumstances mentioned in detail in the judgment of the Court below. It is unnecessary to repeat all the facts and it is sufficient to say that on 21st December 1864 one Iradut Ullah made a usufructuary mortgage of certain shares in four villages, one of which was the village Gangapur. The present suit is for the redemption of that village. The equity of redemption in one of the mortgaged villages, namely, Pul Ratni, was sold by auction and purchased by one Mazhar Ali in 1874. He sold it in 1882, and the share which he purchased ultimately came to one Sarju Singh. In 1887, Sarju Singh brought a suit for redemption and got a decree for redemption of all the four mortgaged villages and obtained possession in 1891. The present appellant Wazir Ali is the purchaser of the rights of Sarju in Gangapur and he is in possession by virtue of his purchase. In 1873 the share in Gangapur was purchased at auction by Kali Charan, defendant 15, who sold it to the plaintiff on 11th October 1913. By virtue of this purchase the plaintiff brought the present suit on 18th

May 1915 for redemption of Gangapur as against Wazir Ali, who is in possession of that village. He has made other persons parties to the suit and one of these is Mt. Saidan Bibi, the second appellant, the widow of Iradut Ullah, the mortgagor. The Court of first instance decreed the claim and the decree of that Court was confirmed by the lower appellate Court.

The first contention raised before us on behalf of the appellants is that the claim is time-barred. This point is concluded by the authority of the Full Bench decision in *Ashfaq Ahmad v. Wazir Ali* (1). This case has been followed in subsequent cases by this Court and we as a Divisional Bench are bound by it. Following that ruling we must hold that the limitation applicable to a suit of this description is that provided by Art. 148, namely, sixty years from the date on which the mortgage became capable of redemption. It is contended that the word "co-mortgagor" should not be extended to purchasers of the equity of redemption. We are unable to agree with this contention. All persons who have stepped into the shoes of the original mortgagor are "co-mortgagors" for all purposes and therefore the rule laid down in the Full Bench case is applicable to the present case, which is that of a purchaser of the equity of redemption in a part of the mortgaged property. The learned Counsel for the appellant referred to the case of *Jai Kishen Joshi v. Budhanand Joshi* (2). That case so far from helping him seems to us to be against his contention. That case was decided on the ground that the representative of the mortgagor who had redeemed the mortgage had asserted a proprietary title and claimed adversely to the true owner. It was held that in a case of that description Art. 144 would apply but one of the learned Judges who decided the case observed as follows at p. 47 of the report (14 A. L. J.):

"If Jaidat had not dealt further with the property but had merely taken possession and held it, the plaintiff would under the ruling of this Court in *Ashfaq Ahmad v. Wazir Ali* (1) have had a period of sixty years from the date of the mortgage of 1860 within which to recover his share from Jaidat on payment of his share of the debt."

We are accordingly of opinion that the Court below was right in holding that the limitation applicable to the case was

that provided by Art. 148 and that the suit was not barred by limitation. It was next contended that the suit should be deemed to be one for a declaratory decree as regards the title of the plaintiff or his vendor Kali Charan. This contention is, in our opinion, untenable as the suit is not for a declaratory decree but for consequential relief, namely, redemption of the mortgage and possession of the property. For the purpose of maintaining the suit it was necessary for the plaintiff to ask the Court to declare his title. The last contention put forward was that as Kali Charan did not bring a suit to assert his title within twelve years of the date of his purchase, that title must be deemed to have become extinct. This contention has no force inasmuch as Kali Charan had no occasion to bring a suit to establish his title. The mortgagor was in possession and the possession of the mortgagor must be deemed to be that of the person entitled to the equity of redemption. For these reasons the appeal must, in our opinion, fail. We dismiss it with costs.

V.B./R.K.

Appeal dismissed.

A. I. R. 1918 Allahabad 387

KNOX, AG. C. J.

Girdhari Pasi--Applicant.

v.

Emperor--Opposite Party.

Criminal Revn. No. 169 of 1918, Decided on 15th May 1918, from the order of Dist. Magistrate, Jaunpur.

U. P. Criminal Tribes Act (3 of 1911), S. 22 (2) (a)—Local Government Rules, R. 8 (a)—"Change of residence" illustrated—Neglect to notify absence from residence is offence.

Accused, a member of a criminal tribe, who was registered while he was in jail, went after his release to a village which was not within the jurisdiction of the Police station within the limits of which he resided and stayed there for one or two days:

Held: (1) that a stay for such a short period could not be considered as a change of residence within the meaning of rule 8 (a) of the rules framed by the Local Government for the purposes of the U. P. Criminal Tribes Act;

(2) that the accused was guilty of neglect to notify to the officer-in-charge of the Police station within the limits of which he resided, his absence from that residence. [P 388 C 1]

A. H. C. Hamilton—for Applicant.

R. Malcolmson—for the Crown.

Judgment.—*Girdhari Pasi*, a member of criminal tribe to which the provisions of S. 10 (b), Act 3 of 1911, have been made applicable by notification of the Local Government, was convicted before a

1. (1889 & 1892, 11 All 428=14 All 1 (F B).

2. (1916) 38 All 188=34 I O 244=14 A L J 41.

Magistrate at Jaunpur of having committed an offence under S. 22, Cl. (2)(a), Criminal Tribes Act 3 of 1911. There is no doubt whatever as to Girdhari having been registered as a member of a criminal tribe. The rule which he is said to have violated, is R. 8 (a), made by the Lieutenant Governor for the purposes of the Criminal Tribes Act. According to that rule every registered member is to notify in person to the officer-in-charge of the Police station within the limits of which he is for the time being residing, his place of residence, any change or intended change of residence, and any absence or intended absence from his residence. The registration sheet was apparently drawn up in jail at the time when Girdhari was still in jail. It sets out that Girdhari resided at Barauli within the limits of the Police station Maryahu.

The document apparently bears no date unless the figures, 11th June 1917, placed over the thumb impression of the accused are to be considered the date. If so, Girdhari was under sentence to remain in jail until 2nd November 1917. It is quite clear that he could not possibly notify, in person to the officer-in-charge of Maryahu, his place of residence. After his release he appears to have gone to a village which was not within the jurisdiction of Maryahu Police station but within the jurisdiction of Badlapur Police station. I do not think his stay at the village Rori which appears to have been merely for a day or two can be considered as a change of residence coming under R. 8 (a). If he committed any offence at all which can be brought under R. 8 (a) it was his neglect to notify in person to the officer-in-charge of Maryahu his residence at Maryahu and his absence from that residence. This will be simply a technical offence under the circumstances and I consider that the time passed by Girdhari in imprisonment is sufficient. The bail, which he has entered, will be discharged.

V.B./R.K.

Sentence reduced.

A. I. R. 1918 Allahabad 388

BANERJI AND RYVES, JJ.

Ratan Moti—Appellant.

v.

Tilak Chand and others—Respondents.

Second Appeal No. 1066 of 1916, Decided on 4th June 1918.

Specific Relief Act (1877), S. 42 — Several persons claiming property as heirs on death of a person—Property in dispute in possession of tenant refusing to pay rent except to rightful owner—Each owner can sue for declaration of title without suing for possession.

Where on the death of a person several persons claim to be his heirs and the property in dispute is in possession of a tenant who refuses to pay rent to either party until one party or the other establishes his title to the property, the possession of the tenant must be deemed to be on behalf of rightful owner and each of the claimants is entitled to bring a suit for a declaration of his title without suing for possession of the property in dispute. [P 389 C 1]

Tej Bahadur Sapru and Nihal Chand
—for Appellant.

S. A. Haidar and S. M. Sulaiman—
for Respondents.

Judgment.—This and the connected Appeal No. 1065 of 1916 arise out of a suit brought by Mt. Ratan Moti for a declaration that a sale deed executed by Jagan Lal, defendant 3, in favour of Tilak Chand and Hushiar Singh, defendants 1 and 2, on 14th February 1911 is null and void as against her interest. The sale-deed relates to a shop which admittedly belonged originally to one Chunni Lal. Chunni Lal had a son Kunwar Sen, whose widow was Mt. Badamo. It is alleged by one party and denied by the other that Kunwar Sen predeceased his father, but the fact is admitted that after Kunwar Sen's death Mt. Badamo was in possession. It is alleged on behalf of the plaintiff that the affairs of Mt. Badamo were managed by her son-in-law, Fakir Chand. In 1881 Mt. Badamo made a gift in favour of Roshan Lal, the son of Fakir Chand by Badamo's daughter. Fakir Chand had another wife by whom he had another son, Mahabir defendant 5. Roshan Lal died in 1900 leaving his widow Mt. Parsandi defendant 4. On 22nd June 1911, Parsandi made a gift in favour of the plaintiff. By virtue of this gift the plaintiff claims to be the owner of the property and she alleges that Jagan Lal had no right to sell it to Tilak Chand and Hoshiar Singh. The defendant Mahabir claims the ownership of the property by reason of his being the son of Fakir Chand who, he says, became entitled to it under the gift made in favour of Roshan Lal. Mahabir has therefore been arrayed as a defendant. The Court of first instance made a decree in the plaintiff's favour but the lower appellate Court has reversed it without

trying the suit on the merits but only on the ground that the plaintiff was entitled to further relief that she ought to have claimed possession of the property and that as she had not done so S. 42, Specific Relief Act, barred the claim. The lower appellate Court holds that the shop being in the possession of one Moti Lal who executed a rent agreement in 1906 in favour of Fakir Chand the plaintiff must be deemed to be out of possession and it must be held that Fakir Chand was in possession and after his death Mahabir Prasad (his son) is in possession.

The plaintiff has preferred this appeal and it is contended on her behalf that having regard to the circumstances of the case the only relief that she could have claimed was a declaratory decree. In our opinion this contention is well founded. It has been found by the lower appellate Court that a rent agreement was executed in favour of Fakir Chand; but it has also found that Moti Lal paid rent to Mt. Badamo so long as she lived and that after Badamo's death Moti Lal refused to pay rent to either party until one party or the other established his or her title to the property. This being the state of things, Moti Lal's possession cannot be said to be the possession of the defendant Mahabir. It is true that as between a landlord and his tenant the latter is estopped from denying the title of the former. But there is no question in the present case as between landlord and tenant. Therefore the numerous rulings which have been cited on behalf of the respondents do not seem to us to have any bearing on this case. Moti Lal having refused to pay rent to any one his possession can only be deemed to be possession on behalf of the rightful owner and therefore the Court in this case instead of dismissing the suit on a preliminary ground should have tried the question of title and determined whether title was in the plaintiff or in Mahabir or in defendants 1-3. As no question of title has been tried it cannot be said that the possession of Moti Lal is the possession of Mahabir. The plaintiff could not frame the present suit as a suit for possession inasmuch as the person in possession, namely, Moti Lal, has not denied her right and she has consequently no cause of action against him. Under these circumstances we are of opinion that the decree of the Court below

is incorrect and must be set aside. We accordingly allow the appeal discharge the decree of the lower appellate Court and remand the case to that Court with directions to re-admit it under its original number in the register and to try it on the merits bearing in mind the observations made above. Costs here and hitherto will be costs in the cause.

V.B./R.K.

Appeal decreed.

A. I. R. 1918 Allahabad 389 Full Bench

KNOX, AG. C. J., BANERJI AND
TUDBALL, JJ.

Narsingh Sahai — Defendant — Appellant.

v.

Sheo Prasad — Plaintiff — Respondent.

Second Appeal No. 420 of 1916, Decided on 16th July and 8th August 1917, against decision of Dist. Judge, Furrukhabad, D/- 3rd December 1915.

(a) Civil P. C. (5 of 1908), S. 122 — Scope of power to make rules—No power to touch Limitation Act exists.

Under S. 122, Civil P. C. the High Court has power to alter, amend and add to rules of procedure laid down by the Code, but nowhere has any power been given to it to touch the Limitation Act. [P 390 C 1]

(b) Allahabad High Court Rules, Ch. 3, R. 2 — Scope—It does not affect or alter S. 12, Limitation Act—Time required to obtain copy of judgment cannot be excluded—Limitation Act (9 of 1908), S. 12.

Rule 2, Ch. 3, Allahabad High Court Rules, requires that no memorandum of appeal from an appellate decree or from any order shall be presented unless accompanied by a copy of the decree or order appealed against and, where it exists, a copy of the judgment of the Court of first instance. This rule however was not intended to alter and cannot be construed as in any way altering the provisions of S. 12, Limitation Act. An appellant therefore is not entitled to exclude from the period prescribed for filing an appeal the days spent in obtaining a copy of the judgment of the Court of first instance. [P 390 C 2]

S. A. Haider and *P. L. Banerji* — for Appellant.

Gulzari Lal and *S. N. Sen* — for Respondent.

Judgment.—The question that has been referred to this Full Bench for decision is: Whether this appeal, out of which the question arises, is barred by limitation or not? In order to decide this point it is necessary to consider first the date on which the judgment of the lower appellate Court was passed and the days that it took the appellant to

obtain copies of the judgment and decree complained of. The judgment was pronounced on 3rd December 1915. We find from the record that an application for the copy both of the judgment and decree was made on 7th December 1915, and that that copy could have been obtained on 18th December 1915. The appellant therefore had at his disposal the ninety days prescribed for the appeal plus a period of twelve days, the time requisite to obtain copies of the judgment and decree complained of. The appeal was filed in this Court on 15th March 1916, and was thus one day beyond the time allowed by the Limitation Act. Prima facie therefore it appears that the appeal at the time when it was presented to the Court was barred. But the appellant seeks to call to his aid a period of another eleven days, more or less, and the ground on which he seeks the addition of this period is that under R. 2, Ch. 3, this Court has made a rule that

"no memorandum of appeal from an appellate decree or from any order shall be presented unless accompanied by a copy of the decree or order appealed against and, where it exists, a copy of the judgment of the Court of first instance."

His contention is that as he could not present his memorandum of appeal unless it was accompanied by the copy of the judgment of the Court of first instance, he can claim the additional period which was requisite for the obtaining of the copy of the said judgment. In the present case that period was a period of eleven days. When the memorandum of appeal was presented to this Court, it was, as a matter of fact, accompanied by the documents which the Code of Civil Procedure and the rule of this Court required should accompany it. But as we have already stated above, the date of presentation was one day beyond the period of time allowed by the Limitation Act. Now S. 12, Lim. Act, is perfectly clear and its language in no way ambiguous. It lays down in Cl. 3, S. 12 of the Act that

"where a decree is appealed from or sought to be reviewed, the time requisite for obtaining a copy of the judgment on which it is founded shall also be excluded."

Nothing further is said, and we are unanimous in holding that this Court has no power by any rule that it may make to alter the period of limitation prescribed by the Limitation Act. We

would further say that the rule as it stands was never intended to and can in no way be construed as altering in any way the Limitation Act. This Court has power to alter, amend and add to rules of procedure laid down by the Code of Civil Procedure. vide S. 122, but nowhere has any power been given to it to touch the Limitation Act. Our answer then to the question which has been sent to us is that the present appeal is barred by limitation. We have not got to determine whether this is a case in which the provisions of S. 5, Lim. Act, are to be applied. That is a matter for the Bench hearing the appeal.

V.B./R.K. *Answer accordingly.*

A. I. R. 1918 Allahabad 390

BANERJI, J.

Maturwa—Applicant.

v.

Emperor—Opposite Party.

Criminal Ref. No. 156 of 1918, Decided on 20th March 1918, made by Sess. Judge, Saharanpur.

Gambling Act (3 of 1867), S. 13 — Order of confiscation of money found in possession of accused is illegal.

Under S. 13, all that can be confiscated are the instruments of gaming.

An order therefore confiscating the money found in possession of an accused convicted under the Gambling Act is illegal and must be set aside. [P 390 C 2]

R. Malcomson—for the Crown.

Judgment.—The accused in this case was convicted under the Gambling Act. The Magistrate who convicted him ordered confiscation of the money which was found in his possession. The learned Sessions Judge has reported the case to this Court, with the recommendation that this portion of the learned Magistrate's order should be set aside as not being in conformity with law. It is clear from the language of S. 13, Gambling Act that all that could be confiscated, were the instruments of gaming. This was so held in the case to which the learned Sessions Judge refers. According therefore to the recommendations of the learned Sessions Judge, I set aside so much of the order of the Magistrate as directs the confiscation of the money found in the possession of the accused and direct that it be refunded to him.

V.B./R.K. *Order partly set aside.*

A. I. R. 1918 Allahabad 391 (1)

KNOX, J.

Mewa Ram—Applicant.

v.

Narain Das and others — Opposite Parties.

Misc. Criminal Case No. 82 of 1918, Decided on 1st May 1918.

Criminal P. C. (1898), S. 526 (e)—One Magistrate of Bench friend of accused is no sufficient ground for transfer.

Complainant applied for the transfer of his case from a Bench of Magistrates on the ground that one of the Magistrates was a friend of the accused and that it would be better if the case were tried by some Magistrate who knew nothing about the parties and that justice was more likely to be obtained from such an officer :

Held: that this was not a sufficient ground for ordering a transfer of the case from the Bench [P 391 C 1, 2]

Ishaq Khan—for Applicant.*N. Upadhyaya*—for Opposite Parties.

Judgment.—This is an application for the transfer of a case of which the number is given and is said to be between Mewa Ram and Narain Das and others, residents of Etawah. The case is said to be pending in the Court of Bench Magistrates, Etawah. The application is that it be transferred from that Court to some other Magistrate of Etawah competent to try the case. It is supported by an affidavit of the vaguest description. No date whatever is given in the affidavit from beginning to end. There is nothing to show that the person who swore to the affidavit, was in Court on any particular date or was in Court on every date when the case came up for trial. The deponent says that Lala Ram Nath, one of the Bench Magistrates, is a personal friend of the accused Narain Das and his two sons. He also says that the accused are in debt to Lala Ram Nath, the said Bench Magistrate. He gives no foundation for the first of the two allegations. The second is said to rest upon a copy of a mortgage-deed 12 years old obtained from the registration office a few days ago. Such an affidavit is not worth the paper on which it is written. I am told that the application is made under S. 526 (e), Criminal P. C., and that the transfer sought, is expedient for the ends of justice. The learned counsel who appears in support of the application explains that it would be better for both parties that this case should be heard by some one who knows nothing about them and that it is more likely that justice will be obtained from such an officer.

This ground is not set out in S. 526, Criminal P. C. and I have not been referred to any precedent showing that this is the interpretation to be placed upon S. 526 (e), Criminal P. C. I shall not venture even to suppose that the learned gentlemen who sit on the Bench with Lala Ram Nath are so indifferent to their reputation and so subservient as to allow Lala Ram Nath to lead them to pass an order contrary to what seems to them to be just. I see absolutely no ground for interfering and direct that the case proceed to trial with all speed, the stay order is discharged.

V.B./R.K.

*Order discharged.***A. I. R. 1918 Allahabad 391 (2)**

PIGGOTT, J.

Pahlwan Singh—Plaintiff—Applicant.

v.

Mt. Janki and others—Defendants—Opposite Parties.

Civil Revn. No. 97 of 1917, Decided on 4th July 1917, against order of Small Cause Court Judge, Mainpuri, D-/ 4th January 1917.

Hindu Law—Debt—Coparcener—Debt not for family necessity—Decree should be against self-acquired property in hands of heirs.

In a suit on a bond executed by a deceased member of a joint Hindu family, not being for the benefit or on behalf of the family, the decree should be against the self-acquired property of the deceased in the hands of his heirs. [P 392 C 1]

Baleshwari Prasad—for Applicant.

Judgment.—On the findings of the Court below there should have been an ex parte decree against Mt. Janki, widow of Baldeo, for the sum claimed, with costs, such decree to be recoverable only against any self-acquired property of the deceased, Baldeo, which might be found in the possession of the widow. The lower Court was quite entitled on the pleadings to try an issue whether Baldeo had died joint or separate from his brothers Chunni, Gokal and Bachchu; and having come to the finding that, at the time of Baldeo's death the four brothers were members of a joint undivided Hindu family it has rightly held that the joint family property whatever it might be, in the hands of the remaining brothers by survivorship could not be liable for a debt incurred by Baldeo, in the absence of any evidence that it was incurred on behalf of the joint family or for the benefit of that family. I doubt whether the modification of the decree of the

Court below to which I think the plaintiff is entitled as a matter of law will be of any particular benefit to him. The object of this application seems to have been to obtain a decree against the brothers. However as the matter has been taken up in revision by this Court, and as the decree of the Court below appears open to objection on this point, I am prepared to modify it. The suit will therefore stand dismissed as against the defendants Chunni, Gokal and Bachchu with costs both here and in the Court below. It will be decreed with costs in the Court below as against the defendant Mt. Janki, with this proviso that the amount of the decree will be recoverable only from any self-acquired property of the deceased Baldeo which may be in the possession of this judgment-debtor.

V.B./R.K.

*Decree modified.***A. I. R. 1918 Allahabad 392**

RICHARDS, C. J. AND TUDBALL, J.

Mahomed Husain Khan—Plaintiff—Appellant.

v.

Hanuman and others—Defendants—Respondents.

Second Appeal No. 1925 of 1916, Decided on 7th August 1918, from a decree of Dist. Judge, Gorakhpur.

Transfer of Property Act (1882), S. 91—Usufructuary mortgage of sir plots—Proprietary rights sold in execution of decree—Purchaser also purchasing mortgagee's rights—Mortgagor as ex-proprietary tenant is entitled to redeem under S. 91—Agra Tenancy Act (2 of 1901), S. 10.

Plaintiff executed a usufructuary mortgage of certain sir plots. Subsequently his proprietary rights in the land were sold and were purchased by the defendants, who later on also purchased the mortgagee rights in the sir plots. Plaintiff brought a suit to redeem the usufructuary mortgage executed by him:

Held: that as soon as the plaintiff's proprietary rights were sold he became an ex-proprietary tenant of the sir plots under S. 10 and that as the mortgage stood between him and his right to occupy the land as an ex-proprietary tenant, he was a person who had an interest in the property within the meaning of S. 91, and was therefore entitled to redeem it. [P 392 C 2]

Kamalakanta Varma—for Appellant.

Haribans Sahai—for Respondents.

Richards, C. J.—This appeal arises out of a suit for redemption. The facts may be very shortly stated for the purpose of explaining the question which we have to decide. In the years 1898 and 1899 two usufructuary mortgages were

made. The property mortgaged was sir plots. Later on after the year 1902, the mortgagor's proprietary rights were sold and purchased by the defendants or some of them or the predecessors of some of them. Subsequently the defendants (or some of them) purchased the mortgagee rights. It is unnecessary to discuss which of the defendants purchased which of the mortgagee rights. Then the present suit was instituted to redeem the mortgage of 1898. The Court of first instance decreed the claim. The lower appellate Court reversed the decree of the Court of first instance and dismissed the suit. On the case coming before a Single Judge of this Court it was referred to a larger Bench.

The argument in favour of the defendants is that the plaintiff having lost his proprietary right has ceased to have any interest in the property and he cannot therefore redeem. It is said that what he mortgaged was his proprietary right in the sir plot. When the proprietary right was sold the right to redeem the mortgage (if any) was transferred to the vendee of the proprietary right. This is the argument. I consider that the contention is not well founded. As soon as the proprietary rights of the mortgagor were sold he became entitled to the rights which the Tenancy Act gives to an ex-proprietor in respect of his sir land, that is the right to occupy the sir land at a preferential rent so long as that rent is paid and the statutory conditions fulfilled. The mortgage of 1898 stood between the mortgagor and his right to occupy the sir land as an ex-proprietary tenant and in my opinion he was a person who had an interest in the property within the meaning of S. 91, T. P. Act. In my opinion if the mortgagor, or his representative, of the mortgage of 1898 had gone to the original usufructuary mortgagee, and if that usufructuary mortgagee had never parted with his mortgagee rights, the mortgagee would have no answer to the claim for redemption upon payment of the mortgage money. If the original mortgagee would have had no defence to such a suit, I cannot see that the purchaser of mortgagee rights, even if he has also acquired the proprietary rights, has any answer to a suit for redemption. I would allow the appeal and restore the decree of the Court of first instance.

Tudball, J.—I fully agree. When the appellant's proprietary rights were

sold the law reserved to the ex-proprietor one out of his bundle of rights, so that he certainly still retains an interest in the property mortgaged sufficient in my opinion to enable him to redeem.

By the Court.—We allow the appeal, set aside the decree of the lower appellate Court and restore the decree of the Court of first instance with costs in all Courts. We extend the time for payment to three months from this date.

V.B./R.K.

Appeal allowed.

A. I. R. 1918 Allahabad 393

PIGGOTT AND WALSH, JJ.

Gumanan and others—Defendants — Appellants.

v.

Jahangira—Plaintiff—Respondent.

First Appeal No. 220 of 1916, Decided on 22nd March 1918, from decree of Addl. Sub-Judge, Meerut.

Hindu Law—Reversioner—Widow—Gift by—Suit by reversioner, with possibility of succeeding to estate, for declaration that gift shall not affect his rights is not maintainable—Nearest reversioner minor—Distant reversionary heir is not entitled to sue.

The right to maintain a suit for a declaration, that a gift made by a widow of her husband's property of which she was in possession shall not affect the rights of the reversioners of the husband, does not belong to any one who may have a possibility of succeeding to the estate of inheritance held by the widow for her life. As a general rule the suit must be brought by the presumptive reversionary heir. It may be brought by a more distant heir, if those nearer in the line of succession are in collusion with the widow or have precluded themselves from interfering.

The minority of the nearest reversioner who is entitled to sue is not of itself sufficient to entitle a distant reversionary heir to maintain a suit. [P 393 C 2; P 394 C 1]

Nehal Chand—for Appellants.

Sheo Dehal Sinha—for Respondent.

Judgment.—This is an appeal by the defendants in a suit for a declaration which arose on the following state of facts. One Tota died, leaving him surviving a widow Mt. Gumanan and a daughter named Mt. Khajani. This daughter has been married, presumably since her father's death, and is now the mother of an infant son named Surju. Before the birth of the daughter's son, the nearest reversioners under the Hindu law, after the life estate of the widow and of the daughter, were two persons named Tulshi and Jahangira. They are distant male agnates, according to the pedigree set up in the plaint, and are

equal in the degree, their grandfathers having been own brothers. Mt. Gumanan has contracted a second marriage (the parties belong to the Jat caste) with Tulshi, one of the aforesaid reversioners, and has borne him children. She has now executed a deed of gift of one-half of her late husband's estate in favour of her sons by Tulshi. Jahangira brought the suit out of which this appeal arises for a declaration that this alienation will not bind him after the death of the widow. In the plaint as filed the existence of Mt. Khajani and her son, Surju, was simply ignored. The defendants made it a part of their defence that even after the life estates of the widow and the daughter came to an end, the next heir to the estate would be Surju, son of Khajani and neither the plaintiff Jahangira nor his alleged joint reversioner Tulshi. The parties were at issue upon various questions of fact in the Court below. On the one hand the defendants put the plaintiff to proof of the pedigree set up by him. On the other hand the plaintiff alleged that Mt. Khajani was not the daughter of Tota at all. It seems to have been suggested that she was a daughter of Tulshi by a former wife, whom he had married before he contracted his union with Mt. Gumanan. These questions of fact have been determined by the learned Subordinate Judge in the sense already stated, and the parties before this Court are not prepared to contest these findings of fact.

The appeal is based therefore upon a single question of law, the contention being that Jahangira should not be permitted to maintain the suit, seeing that he is not the presumptive reversioner to the estate of Tota in the presence of the daughter's son, Surju. Since the decision of their Lordships of the Privy Council in *Rani Anand Kunwar v. Court of Wards* (1), this question of law may be regarded as having been definitely settled. The right to maintain a suit of this sort does not belong to any one who may have a possibility of succeeding to the estate of inheritance held by the widow for her life. As a general rule the suit must be brought by the presumptive reversionary heir. It may be brought by a more distant heir, if those nearer in line of succession are in collusion with the widow or have precluded themselves from inter-

fering. These principles were applied by a Bench of this Court in a case very similar to the present, that of *Meghu Rai v. Ram Khelawan Rai* (2), and this decision seems to be clearly in favour of the defendants appellants and against the view taken by the Court below. The learned Subordinate Judge founded his decision on the case of *Raja Dei v. Umed Singh* (3). That case would be on all fours with the present if the gift by Mt. Gumanan had been in favour of the minor Surju, son of Mt. Khajani. It could then have been said that the donee was precluded from suing to contest the validity of the gift and that a more distant reversionary heir was entitled to come forward and assert his rights. On the facts now before us, the only arguable plea which can be taken on behalf of the plaintiff-respondent is based upon the fact of Surju's minority. This however in no way precludes the bringing of a suit by a next friend on his behalf. In the plaint itself there is no suggestion of collusion on the part of the minor, or of the minor's mother as his natural guardian. Their interest is simply ignored. On this state of facts the plaintiff cannot claim the benefit of the exceptions recognized by their Lordships of the Privy Council to the general principle that the suit for a declaration of this sort must be brought by the presumptive reversionary heir. This appeal therefore must succeed. We allow it accordingly and setting aside the decree of the Court below dismiss the plaintiff's suit with costs throughout.

V.B./R.K.

Appeal allowed.

2. (1913) 35 All 326=19 I C 814.

3. (1912) 34 All 207=13 I C 632.

A. I. R. 1918 Allahabad 394

TUDBALL AND WALSH, JJ.

Qasin Ali Khan—Judgment-debtor—Appellant.

v.

Mt. Bhagwanta Kuar—Decree-holder—Respondent.

Ex. First Appeal No. 41 of 1917, Decided on 7th August 1917, against decision of Sub-Judge, Azamgarh, D/- 23rd September 1916.

(a) Civil P. C. (1908), O. 41, R. 1—Copy of decree appealed from must accompany memorandum of appeal.

Rule 1 O. 41, Civil P. C., makes it an inflexible rule that in the case of appeals from decrees the memorandum of appeal shall be accom-

panied by a copy of the decree. The Court cannot dispense with it. [P 395 C 2]

(b) Civil P. C. (1908), S. 47 and O. 41, R. 1—Order under S. 47—Appeal—Copy of judgment and decree must be filed—Order under S. 47 being decree—Appeal therefrom is governed by O. 41.

Where there is a judgment and decree based thereon on a question within S. 47, Civil P. C., a valid appeal is not filed by presenting a memorandum of appeal without a copy of the decrees. [P 396 C 1]

Semble.—An execution proceeding is a proceeding in the suit and the formal decision of a point within S. 47, Civil P. C., is a decree in that suit inter partes and the procedure in an appeal therefrom is that laid down in O. 41, Civil P. C., 1908. [P 396 C 1]

Kamala Kant Verma—for Appellant.

S. M. Sulaiman—for Respondent.

Tudball, J.—The facts of this case are as follows:—The respondent's predecessor-in-title obtained a decree for sale against the appellant and others in the year 1897. Execution of the decree was obtained on many occasions but the decree has not yet been satisfied. Another application for execution has now been made. The present appellant and one other objected that the execution of the decree was barred under S. 48, Civil P. C. The Court below, relying on a ruling of this Court that the rule laid down in S. 48 did not govern the case of mortgage decrees passed prior to the coming into force of the present Code of Civil Procedure, disallowed the objection. In so doing the Subordinate Judge wrote a judgment which was delivered on 23rd September 1916. He also drew up a formal order or rather a decree, i. e., a formal expression of his decision of the question. The present appellant took no further step in the matter until 9th December 1916, when he applied for a copy of the judgment only and this was ready for him on 14th December 1916. The period of 90 days allowed by law for an appeal expired on 23rd December but allowing six days spent in obtaining the copy of the judgment the period expired during the Christmas vacation. On 2nd January 1917, he came to Allahabad and his vakil directed him to obtain and file a copy of the decree.

On that date a memorandum of appeal with the copy of the judgment only was filed in Court. The appellant applied for and obtained a copy of the decree in the second half of January 1917 and he finally produced it in Court on 2nd February 1917. A preliminary objection is taken

that the appeal was not filed within time and is barred by limitation. It is urged that this is an appeal from a decree and that in accordance with the provisions of O. 41, R. 1, the memorandum of appeal must be accompanied by a copy of the decree appealed from and also of the judgment on which it is founded (unless the Court dispenses with the latter). The copy of the decree in the present case was not filed until long after the period for appeal had passed. In fact no application for it was made within the period of limitation and prima facie this objection seems well founded. On behalf of the appellant, however it is urged that the decree in the present case is not the formal expression of the Court's decision but is the document of 23rd September 1916, which I have described above as the judgment. It is urged that the definition of decree in S. 2, Cl. 2, clearly lays it down that in a case like the present, arising under S. 47, Civil P. C., the decree is the determination of the question i. e., the Court's decision embodied in what I have designated the judgment, that that was filed with the memorandum of appeal on 2nd January 1917, and the appeal is, therefore within time. In support of this argument, reliance is placed upon a decision of a Bench of the Calcutta High Court in *Kherode Sundari Debi v. Jnanendra Nath Pal* (1).

In this case the judgment shows that no formal expression of the Court's decision was drawn up. Whatever there was on record was in one document, a copy of which was filed. It was held that "the order itself is the decree and no other decree is necessary." I find it impossible to agree that the order itself is the decree and no other decree is necessary. The Code defines a judgment as the statement given by the Judge of the grounds of a decree, or order. The decree is the formal expression of an adjudication which conclusively determines the rights of the parties. It is this formal adjudication (and not the judgment) which determines the questions between the parties. The word "decree" includes the "determination of a question within S. 47." To my mind it is quite clear that the determination of such questions is in the "formal" expression of the Court's adjudication on the points. The judgment gives merely grounds for the decision. In the case of "order" also the Code

clearly distinguish between the judgment i. e., the grounds of the order and the "order" itself, which is the formal expression of the decision. An Indian "judgment" is not to be confused with an English judgment. The latter corresponds to the formal decree or order passed in the case. The decision of a question within S. 47 would be an "order" and not a decree were it not specially laid down (for the purposes of appeal) that it should be deemed to be a "decree."

Order 41 contains the rules applying to appeals from decrees and O. 43 contains those applying to appeals from orders, and R. 2 shows that the rules of O. 41 are to be applied as far as may be to appeals from orders. R. 1, O. 41 clearly makes it an inflexible rule that in the case of appeals from decrees the memorandum of appeal shall be accompanied by a copy of the decree. The Court cannot dispense with it. In the case of appeals from orders, it makes it equally compulsory to file a copy of the "order", and that word is defined clearly in S. 2 and is something apart from and different from the judgment. This Court has always insisted on subordinate Courts drawing up a formal order.

In the list of papers which go to form File A part 1, record No. 14 is the judgment and No. 15 is the "decree including decree under S. 47": vide p. 40, Ch. 5, General Rules, Civil, for Subordinate Courts. The Court below prepared both documents, i. e., it wrote its judgment and drew up its decree. If in the present instance, the appellant's objection to the execution of the decree had been allowed and his costs had been awarded to him, the judgment is not what he would have sought to execute in recovering his costs, he would take a copy of the decree in which alone would be set forth the costs awarded and recoverable. The practice of the Courts is well known and in my opinion is in accordance with law. The learned vakil, who has argued the point ably and thoroughly, admits that when his client arrived on 2nd January 1917, with a copy of the judgment only, he at once sent him off to get a copy of the decree which was also absolutely necessary to enable the appeal to be filed. Moreover when he filed the memorandum of appeal, he asked for time to file the copy of the decree and an ex parte order was passed in his favour.

1. (1902) 6 O W N 239.

In the Calcutta case, apparently no decree had been prepared and the omission of the Court could not be allowed to prejudice the appellant, and that alone would have sufficed for a decision in his favour on the point. I cannot accept the position that where there is a judgment and a decree based thereon on a question within S. 47, Civil P. C., a valid appeal is filed by presenting a memorandum of appeal without a copy of the decree. An execution proceeding is a proceeding in the suit and the formal decision of a point under S. 47, Civil P. C., is a decree in that suit inter partes and the procedure in an appeal therefrom is that laid down in O. 41. It is impossible to hold that the legislature intentionally wished to place appeals like the present outside the pale of O. 41 and O. 43 and intentionally refrained from laying down any procedure for them. There therefore was no appeal before this Court until 2nd February 1917. We have, however, been asked to admit this appeal out of time in exercise of the powers granted by S. 5, Limitation Act. An affidavit has been filed. I am not impressed with it. It does not carry any conviction to my mind as to the truth of the facts alleged therein. To my mind this is one of those cases of negligence and carelessness which so frequently occur. The appellant has no merits. It is not that he has paid off the debt he owed. He simply relies on a plea of limitation. It is admitted that the decision of the Court below is in accordance with a decision of two Judges of this Court. He in turn is met with a counter plea of limitation in this appeal. This is not a hard case. What is sauce for the respondent is in this case sauce for the appellant. I therefore would not admit the appeal out of time.

Walsh, J.—I entirely agree. The Code is quite free from ambiguity upon the point. The Calcutta case may have been rightly decided upon the facts, but for the reasons given by my learned brother I am unable to agree with its construction of the Code, which was unnecessary for the decision. I agree in dismissing the appeal.

By the Court.—The appeal is dismissed with costs, including fees on the higher scale.

V.B./R.K.

Appeal dismissed.

A. I. R. 1918 Allahabad 396

TUDBALL AND ABDUL RAOOF, JJ.

Puttu Lal—Defendant—Appellant.

v.

Ram Sarup—Plaintiff—Respondent.

First Appeal No. 146 of 1917, Decided on 23rd March 1918, from the order of Sub-Judge, Farrukhabad.

Malicious Prosecution—Damages—Charge false to defendant's knowledge—Malice can be inferred from conduct.

Defendant came into a criminal Court with a story that was false from beginning to end and false to his own knowledge and charged the plaintiff with certain offences. Evidence was given in support of the charges but it was disbelieved and the plaintiff was acquitted:

Held: (1) that the plaintiff was entitled to maintain a suit against the defendant for damages for malicious prosecution; (2) that the complaint being false to the knowledge of the defendant, the Court was bound to infer malice from his conduct. [P 397 C 2]

Kailas Nath Katju and Tej Bahadur Sapru—for Appellant.

Surendra Nath Sen and Gulzari Lal—for Respondent.

Judgment.—In this case the plaintiff-respondent has sued the defendant-appellant for damages for malicious prosecution. The facts are simple. The parties were old enemies. On 15th August 1915 the plaintiff repaired a boundary mark between his grove and the defendant's grove or rather he had it repaired by his servants. On 16th August, the defendant Puttu Lal made a complaint before a Magistrate to the effect that Ram Sarup had gone to the grove armed with a gun assisted by four or more men armed with lathis, axes and spades; that they had, in spite of his protest, dug up the boundary mark and rebuilt it so as to include a portion of his grove in Ram Sarup's grove, and as he protested, they pushed him and assaulted him, and had moreover cut down two trees belonging to him. The Magistrate took his statement on oath and issued a summons to Ram Sarup to appear in Court, informing him that he had been charged with offences under Ss. 426 and 447, I.P.C. Puttu Lal had made a complaint of offences under these two sections and also under Ss. 147 and 352, I. P. C.

The case was tried. Puttu Lal entered the witness-box. He testified to the facts which he had alleged, including assault, riot, wilful mischief and criminal trespass. He called witnesses who corroborated his statement. Evidence was taken as to whether or not there had been any encroachment. The Magis-

trate came to the conclusion that the dispute was only a dispute over a boundary, that no offence had been committed and he acquitted the accused. Puttu Lal, thereupon, brought a suit in the civil Court under S. 9, Specific Relief Act. for possession of land from which he claimed that Ram Sarup had dispossessed him. The Munsif held that no dispossession had been proved and dismissed the suit. Ram Sarup then brought the present suit for damages for malicious prosecution. It was dismissed by the Court of first instance. The lower appellate Court has come to the conclusion that the prosecution story in the criminal case by Puttu Lal was false to the knowledge of Puttu Lal himself and that therefore there was no question of any reasonable or probable cause in the case, in that to Puttu Lal's own knowledge the complaint was false. On this finding but without mentioning the word "malice," the lower Court remanded the case to the Court of first instance for decision of the other points which had not been touched by that Court. It is urged that there was no prosecution by Puttu Lal of Ram Sarup in respect to the offences under Ss. 352 and 147, I. P. C. and that therefore Puttu Lal is not liable for damages in that there was no prosecution for offences under these two sections.

We do not think that the case can be narrowed down in this way. Puttu Lal, according to the finding of the Court below, went into a criminal Court with a story that was false from beginning to end, and false to his own knowledge. He made that false complaint. Ram Sarup was dragged into Court not of his own free will but against it. Evidence was given by Puttu Lal which, if it had been accepted, would have resulted in the conviction of Ram Sarup for all four of the offences mentioned in the written complaint, even though only Ss. 426 and 447 had been mentioned in the summons issued. In our opinion the facts, as found by the Court below, prove clearly and distinctly that Puttu Lal did prosecute Ram Sarup on a false charge and that he did his best to secure a conviction for offences under all four sections. The cases quoted to us, viz., *Golap Jan v. Bhola Nath Khetry* (1), *Nalliappa Goundan v. Kailappa Goundan* (2), do not help us in the present case at all. They are all cases in which no process was

issued according to law to the accused person. The views taken by the Calcutta and Madras High Courts do not agree with the view taken by the High Court of Bombay: vide the case of *Ahmedbhai Habibbhai v. Framji Edulji Bamboat* (3). However, it is unnecessary for us to decide which of these two views is correct according to our opinion, for in the present case the accused was dragged into Court and Puttu Lal did all that lay in his power to prosecute him. It is next pleaded that there is no finding by the Court below on the question of malice. It is correct to say that there is no direct finding as to malice, but the facts found by the Court below are such that a Court is bound to infer malice from these facts, for the complaint made by Puttu Lal was held to be false and without foundation. There is moreover the additional finding of fact that the parties were old enemies and had been at litigation. Malice is clearly and distinctly established in the case and in our opinion there is no force in this appeal. It is therefore dismissed with costs.

V.B./R.K. *Appeal dismissed.*

3. (1904) 23 Bom 226.

A. I. R. 1918 Allahabad 397

RICHARDS C. J. AND TUDBALL, J.

Data Din—Plaintiff—Appellant.

v.

Nanku and others—Defendants—Respondents.

Second Appeal No. 1656 of 1916, Decided on 26th July 1918, from a decree of Small Cause Court, Judge, Allahabad.

Civil P. C. (1908), S. 47—Mortgage suit against father and son—Absence of necessity—Money decree passed—Son "exempted" and given costs—Son's estate attached—Son's objection allowed—Suit for declaration that son's share could be sold on ground of pious obligation to pay father's debt—Previous decree discharged son and fresh suit was barred under S. 47.

A suit was instituted against a father and son on the basis of a mortgage. The son put forward the plea that there was no family necessity. The Court gave a simple money decree against the father, which stated that the son was "exempted" and that he should get his costs from the plaintiff. The latter executed the decree against the father's estate, and that having proved insufficient, he sought to attach and sell the son's estate. The son objected in execution and his objection was allowed. Thereupon the plaintiff brought the present suit seeking a declaration that the son's property could be sold in execution of the decree on the principle of the pious obligation of a son to pay his father's debts:

Held: (1) that the effect of the decree was to dismiss the suit as against the son with costs; (2) that under S. 47 the order on the son's objec-

1. (1911) 38 Cal 880=11 I O 311.

2. (1901) 24 Mad 59.

tion in execution was final and that the suit was barred under that section. [P 393 C 1]

Haribans Sahai and Gajadhar Prasad—for Appellant.

Kanhaya Lal—for Respondents.

Judgment.—This appeal arises under the following circumstances. A suit was instituted against a father and son on the basis of a mortgage. A plea was put forward on behalf of the son that there was no family necessity. The result of the suit was that the Court gave a simple money decree against the father and held that the son was not liable, and in the decree stated that the son was "exempted" and that he should get his costs from the plaintiff. We may pause here to say that we consider that this was exactly the same as if the Court had by the decree expressly dismissed the suit with costs as against the son. The plaintiff-decree-holder executed the decree against the father's estate. That having proved insufficient he sought to attach and sell the son's estate. The son objected in execution and his objection was allowed. Thereupon the plaintiff brought the present suit seeking a declaration that the son's property could be sold in execution of the decree on the principle of the pious obligation of a son to pay his father's debts. The learned Judge of this Court, on being informed that a difficult question of Hindu Law, particularly having regard to certain remarks of their Lordships of the Privy Council in the recent case of *Sahu Ram Chandra v. Bhup Singh* (1) arose, referred the appeal for the decision of two Judges.

On behalf of the respondent it has been pointed out that this question of law really does not arise because the allowing of the son's objection in execution was final and the present suit cannot be brought. Under S. 47 all matters relating to the execution and discharge of the decree arising between parties to the suit must be disposed of in execution and not by a separate suit. There had been some conflict of authority previous to the passing of the Code of Civil Procedure of 1908. This Court had held that the parties must not only be parties to the suit but they must be parties to the decree. Any conflict of authority has been set at rest by the explanation which has been added to S. 47, namely:

1. A I R 1917 P C 61=39 I C 280=44 I A 126
=39 All 437 (P C).

"for the purposes of this section, a plaintiff whose suit has been dismissed and a defendant against whom a suit has been dismissed are parties to the suit."

It was contended on behalf of the appellant that this explanation does not apply where a defendant has been merely "exempted." We think there is no force whatever in this contention. The expression in the decree exempting a particular defendant was probably an inaccurate expression, but the operation of the decree was to dismiss the suit as against that particular defendant. We dismiss the appeal with costs.

V.B./R.K.

Appeal dismissed.

A I. R. 1918 Allahabad 398

PIGGOTT, J.

Muniruddin—Defendant—Applicant.

v.

Samirunnissa Bibi—Plaintiff—Opposite Party.

Civil Revn. No. 34 of 1917, Decided on 3rd July 1917, from order of Small Cause Court Judge, Allahabad, D/- 13th December 1916.

Provincial Small Cause Courts Act (1882), Sch. 2, Art. 38—Suit for annuity charged on property is not cognizable.

Plaintiff sued her deceased husband's brother to recover the amount of an annuity, alleging that under the will of his father the defendant took certain property subject to an annual charge in favour of the plaintiff:

Held: that the suit was one relating to maintenance within the meaning of Art. 38, Sch. 2, Provincial Small Causes Court Act and was not therefore cognizable by a Court of Small Causes. [P 399 C 1]

S. M. Sulaiman—for Applicant.

Raza Ali—for Opposite Party.

Judgment.—The plaintiff in this case is the widow of a deceased brother of the defendant. It appears that the plaintiff's husband died during the lifetime of his father. Para. 1 of the plaint alleges that, under the will of their deceased father, the defendant and his brothers took certain property subject to a charge of Rs. 36 year in favour of the plaintiff. Para. 2 of the plaint states that, in virtue of an agreement therein referred to, the defendant was bound to pay to the plaintiff Rs. 12 a year out of the Rs. 36 a year already referred to. An examination of this agreement shows that the defendant and his brother, in distributing this share of Rs. 36 per annum amongst themselves, expressly referred to it as an allowance for the maintenance of the plaintiff. It is quite clear

that the money in respect of which the suit is brought is claimed as part of an annuity due to the plaintiff. The only point about which there can be any controversy is whether this annuity is of such a nature as to make a suit for the recovery of the portion of it a suit relating to maintenance within the meaning of Art. 38, Sch. 2, Provincial Small Causes Courts Act, 9 of 1887.

The suit was filed in a Court of Small Causes, and no objection to the jurisdiction of that Court was taken by the defendant. The application now before me assails the jurisdiction of the Court below to entertain this suit. The point ought certainly to have been taken in that Court; but at the same time, I am not prepared to hold that jurisdiction can be conferred by consent of parties. I think that, if the plea had been taken as it ought to have been, it is exceedingly probable that the Court below would have regarded the question as at least so far open to doubt as to warrant an order under S. 23, Act 9 of 1887. I think the defendant, who is the applicant before this Court, is entirely to blame for the necessity he has been under of bringing this question of jurisdiction before this Court, and that notice should be taken of this fact in the Court's order as to costs. I am of opinion however that the suit is one the cognizance of which by a Court of Small Causes was barred by Art. 38 aforesaid. I do not see that this conclusion can be assailed by any line of reasoning which would not involve raising in the alternative, the question whether the jurisdiction of the Small Cause Court was not barred by Art. 11 or Art. 28 of the same schedule. On behalf of the plaintiff I have been referred to two cases of this Court, *Mahadeo Rai v. Deo Narain Rai* (1) and *Masum Ali v. Mohsin Ali* (2). Both cases are clearly distinguishable. In the former the claim was for arrears of an allowance originally granted in favour of one person, by a plaintiff who claimed to be entitled to continue in respect of that allowance as the heir of the person in whose favour the allowance had originally been granted. Either therefore the plaintiff was not entitled to this money at all, or he could not be said to be entitled to it as maintenance; for a maintenance allowance ne-

cessarily comes to an end with the death of the person in whose favour it was granted. In the other case the learned Judge of this Court who decided it laid great stress upon the fact that the circumstances of this suit were such that neither the right of maintenance nor the amount of maintenance were matters in issue requiring determination in that case. In the present case the question of the plaintiff's right to receive this annuity required determination and has been determined by the Court below. If therefore this annuity was of the nature of a maintenance allowance, the cognizance of the Court of Small Causes was barred: In my opinion it was so barred. I set aside the decrees of the Court below and in lieu thereof direct an order to be passed returning the plaint for presentation to a regular civil Court having jurisdiction to entertain the same. The defendant will in any event bear all costs hitherto incurred in the Court of first instance and his own costs of this application. The plaintiff's costs of this application in this Court will abide the result of the suit.

V.B./R.K.

Decree set aside.

A. I. R. 1918 Allahabad 399

KNOX, J.

Karimuddin —Accused—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 85 of 1918, Decided on 11th April 1918, from order of Sess. Judge, Allahabad.

Penal Code (1860), S. 408—Accused engaged by station master to mark goods, recovering money as overcharge and converting it to his own use—Accused not being servant of Railway Company cannot be convicted under S. 408.

Accused was engaged by a station master to mark and load goods delivered to the Railway Company for despatch and was paid out of an allowance granted by the company to the station master. The latter also entrusted the accused with the writing up of the cash register. The accused recovered a certain sum as an overcharge from a consignor of goods and converted it to his own use. He was thereupon tried and convicted of an offence under S. 408:

Held: that the accused not being a clerk or servant of the Railway Company, could not be convicted of an offence under S. 408 in respect of the sum received by him. [P 400 C 2]

Peary Lal Banerji—for Applicant.

B. Malcomson—for the Crown.

Judgment.—*Karimuddin* has been convicted of three offences, each offence.

1. (1905) 2 A L J 697.

2. (1890) A W N 201.

under S. 408, I. P. C., and sentenced to six months' rigorous imprisonment on each offence, the sentences to run consecutively. It appears from the record and the arguments addressed to me that station masters on the East Indian Railway get some kind of allowance from the railway in return for goods to be despatched by the railway to be marked and loaded or otherwise handled. The station master Raghunath Pershad appointed Karimuddin and gave him Rs. 10 a month for doing this work. There was no contract of any kind between the East Indian Railway Company and Karimuddin. Raghunath Pershad appears to have made or permitted Karimuddin to write a number of railway registers. It is not for a moment asserted that the East Indian Railway Company sanctioned this allotment of work to Karimuddin or were in any way cognizant of it. Raghunath Pershad took leave and was succeeded by one Rikhi Lal. Rikhi Lal appears to have gone a step further than Raghunath Pershad in employing Karimuddin in this kind of work and to have given him the cash registers to write up. The result or alleged result of these proceedings was that certain items of money disappeared. The accused was charged with embezzling three separate different items. The nature of these items is somewhat different. The first item is an item of Rs. 5-10-0. The prosecution allege that this was an overcharge upon certain goods consigned through the East Indian Railway to one Sat Narain. Sat Narain appears to have paid the sum under protest, and to have written to the Railway Company on the point.

The item was represented in a letter, the writing of which is traced to the accused but the signature on the writing is that of Rikhi Lal's. The money never came into the hands of the East Indian Railway Company. It was described as a demurrage charge, while I understand that the railway have never put it forward as money due to them either on account of goods consigned or demurrage thereon. The other two items are of the same description, but for the purpose of this revision I need not go into them. The contention raised before me is that with reference to the first item no offence coming within S. 408, I. P. C., has been proved and the trial of the accused for the three offences under S. 408,

I. P. C., is illegal, a joint trial of the three items not being allowable by law. It is really round this first charge that the argument in revision centres. I accept the plea that even if the facts be considered proved, the first is not an offence which falls within S. 408, I. P. C. Karimuddin was neither clerk nor servant of the Railway Company. he was not employed as clerk or servant of theirs and not being so, he could not be entrusted in such capacity with this sum of Rs. 5-10-0. It is contended before me that Karimuddin having chosen to take upon himself the duties and responsibility of a clerk of the East Indian Railway Company, must be regarded as a clerk and cannot afterwards say that he is not such a clerk and my attention was called to the case of *Queen Empress v. Parmeshar Dutt* (1). There is however an important difference in the case cited and the present case. Parmeshar Das was recognised by the authorities as filling the position of a public servant. There was no such recognition in this case, nor can I suppose that there would ever have been such a recognition. The probabilities are that if the attention of the East Indian Railway Company had been called to the fact that this marksman was posting up registers and receiving moneys, they would have utterly refused to recognise him and would have called Rikhi Lal to account for such an irregularity. Then further my attention was called to what was argued how far the sum of Rs. 5-10-0 taken under the circumstances stated would come at all under the crime of embezzlement. It was not the property of the East Indian Railway Company, it was repudiated as not being their property and whatever may have been the offence committed in respect of that Rs. 5-10-0, it was not the offence of embezzlement. The joint trial under the circumstances was illegal. I quash it, set aside the convictions and sentences. Karimuddin must be released.

V.B./R.K.

Conviction set aside.

1. (1886) 8 All 201.

A. I. R. 1918 Allahabad 401 (1)

RICHARDS, C. J. AND TUDBALL, J.

Tota Ram and another—Defendants—Appellants.

v.

Gopal Singh—Plaintiff—Respondent.

Second Appeal No. 1325 of 1916, Decided on 2nd May 1918, from a decree of Dist. Judge, Mainpuri.

Pre-emption—Suit for—Re-sale to vendor after institution of suit—Vendor ceasing to be cosharer—Plaintiff was entitled to pre-empt.

Where after the institution of a suit for pre-emption the vendee re-sold the property to the vendor, who had ceased to be a cosharer at the time of the re-sale :

Held : that the plaintiff was entitled to a decree notwithstanding the resale. [P 401 C 2]*Kailas Nath Katju*—for Appellants.*Tej Bahadur Sapru*—for Respondent.

Judgment.—This appeal arises out of a suit for pre-emption. The Court of first instance dismissed the suit. The lower appellate Court gave a decree. One Angnu was the vendor. The vendee was a stranger. In the first instance only the vendee put in a written statement. He alleged that after the commencement of the suit he had resold the property to the original vendor. He put in further the plea that the consideration mentioned in the sale-deed was the correct consideration. Later on the vendor also appeared and put in a written statement alleging amongst other things that the plaintiff had refused to purchase. The Court of first instance found that the plaintiff had refused to purchase and it was on this ground that the suit was dismissed. The lower appellate Court disbelieved the evidence as to refusal and granted the decree. Two points have been urged before us in the appeal. The first relates to the finding of the Court below upon the issue as to the refusal by the plaintiff to purchase. Having fully heard the learned vakil for the appellant, we consider that we are bound to accept the finding of the lower appellate Court that the plaintiff did not refuse to purchase. The Court has given its reasons for coming to this conclusion. The next point urged was that the resale to the vendor was a complete defence to the suit notwithstanding that the resale did not take place until after the present suit was instituted. This is contrary to the rulings in *Narain Singh v. Parbat Singh* (1) and

1. (1901) 28 All 247.

1918 A/51 & 52

Laikat Husain v. Rashid-ud-din (2). In those cases the re-sale had been made to a cosharer. In the present case it does not appear that the original vendor was a cosharer at the time of the resale. A perusal of the sale deed rather suggests the contrary. It seems as if the vendor, Angnu, sold all that he was possessed of. In any event if the defendant relied upon the re-sale to a cosharer, the burden lay upon him of proving the fact. We dismiss the appeal with costs.

V.B./R.K.

Appeal dismissed.

2. (1906) 29 All 125.

A. I. R. 1918 Allahabad 401 (2)

TUDBALL, J.

Sunder Lal—Decree-holder — Appellant.

v.

Banarsi Das and others—Judgment-debtors—Respondents.

Execution Second Appeal No. 772 of 1917, Decided on 28th January 1918, from decrees of Dist. Judge, Agra, D/- 27th March 1917.

Limitation Act (1908), Arts. 181 and 182—Decree for costs—Decree satisfied by attachment and execution of decree in favour of judgment-debtor—Decree attached set aside on appeal — Refund by decree-holder of amount realized—Fresh application for execution is governed by Art. 182 and not by Art. 181.

Appellant obtained a decree for costs against respondent. In execution of that decree appellant attached and executed a decree obtained by the respondent against a third person. The latter decree was however set aside on appeal, and appellant had to refund the money realized by him in execution of that decree. The appellant then made a fresh application for execution of his own decree more than three years after his last application.

Held : (1) that the application being in form and in substance one for execution of a decree, Art. 181 had no application to it; [P 402 C 2]

(2) that the application was governed by Art. 182 and having been made more than three years after the date of the last application was barred by limitation. [P 402 C 1]

Mohan Lal Sandal—for Appellant.

Judgment.—All the facts except one or two are clearly set out in the judgment of the Court below. On 16th May 1910 the appellant obtained a decree for costs against Banarsi Das in the Court of the Subordinate Judge of Agra. Banarsi Das who was the plaintiff in that suit appealed to the High Court and his appeal was dismissed on 28th October 1912, costs being awarded to the respondents therein of whom the present appellant was one. Separate costs were allowed to him. On

9th August 1910 he applied for execution of the first Court's decree by the arrest of his judgment debtor. The application fell through. On 15th December 1911 he applied for execution by attachment of a decree which Banarsi Das had obtained against certain other persons. The decree was duly attached and on 13th March 1912 the application for execution was filed. The appellant then proceeded to execute the decree which he had attached as against Banarsi Das' judgment-debtors. The property was sold, the decree was satisfied and the present appellant also remained satisfied. But unfortunately for him the decree which he had executed against Banarsi Das' judgment-debtors was pending in appeal and it was finally set aside and the appellant had to refund the money, which he did on 27th September 1915. In the meantime as will be evident from the date of the decision of the High Court on appeal, Banarsi Das' appeal had been dismissed and appellant had been awarded the costs of that appeal also. On 11th January 1913 he had applied for execution of the decree of the High Court awarding him costs, and that application was struck off on 14th January 1913 after one other decree in some other case had been attached thereunder. Having had to refund the money that he had recovered towards the satisfaction of the decree of the Subordinate Judge, the appellant on 13th February 1916 made the present application for execution to the Subordinate Judge of Muttra. He sought not the attachment of any property but the arrest of the judgment-debtor. The Courts below have held that the application is barred under Art. 182, Lim. Act, and the applicant has come here.

Prima facie the application is an application for execution of a certain decree and it is under Art. 182 prima facie barred by time, even, if we take into consideration the application of 11th January 1913. On examination of the present application I see that it was actually filed in the Court of the Subordinate Judge of Agra on 12th January 1913, that is, one day out of time. The Court at Agra had no jurisdiction and the applicant had to go on to the Court at Muttra. It is alleged that Art. 181, which is general Article for applications to which no period of limitation is provided, should be applied to the facts of the present case. It is pointed

out with some earnestness that the appellant was up to 27th September 1915 in possession of the money and did not need to apply for any further execution and that it is the refund of the money which has given him a fresh ground for application for execution, and I am asked to apply Art. 181 to the special circumstances of this case. Much as I should like to be able to help the appellant, I do not see how I can avoid the clear and distinct language of the Limitation Act. Art. 182 lays down a period of three years for an application for the execution of a decree. In form and in substance the present application is an application for execution of the decree, and Art. 181, in my opinion cannot possibly be applied. S. 5, Lim. Act, also does not apply, and I cannot admit the application out of time under that section. To some extent the appellant is also to blame for if he had come into court with an application for execution immediately after he had refunded the money, it would have been well within time as that would have been within three years from the application of 11th January 1913. He has been negligent and I am afraid must take the result of his own acts. The appeal therefore fails and is dismissed. As the opposite party does not appear, I pass no order as to costs in this appeal.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1918 Allahabad 402

RICHARDS, C. J. AND BANERJI, J.
Gobind Das and others—Decree-holders—Appellants.

v.

Karan Singh and others—Objectors—Respondents.

First Appeal No. 115 of 1917, Decided on 19th December 1917, from order of Dist. Judge, Jhansi.

Provincial Insolvency Act (1907), S. 16—Attachment of property of judgment-debtor ceases to have any effect after his adjudication as insolvent—Creditor cannot continue execution proceedings.

An attachment of the property of a judgment-debtor by a creditor ceases to have any effect after the adjudication of the judgment-debtor as an insolvent inasmuch as all the property of the insolvent vests in the Receiver, so that after the order of adjudication the creditor has no locus standi to continue execution proceedings.

[P 403 C 1]

Girdharilal Agarwala — for Appellants.

Peary Lal Banerji—for Respondents.

Judgment.—A preliminary objection is taken to the hearing of this appeal that the appellants have no locus standi. The dispute is about the property of certain buffaloes. The appellants alleged that these buffaloes belonged to the insolvent. It appears that the appellants were decree-holders and had attached the buffaloes just before the adjudication in insolvency. Upon the adjudication in insolvency the attachment ceased to have any effect. All the property of the insolvent vested in the Receiver. In this particular case there was no actual Receiver appointed, but the Court itself in such cases is the Receiver (see S. 23). In our opinion the preliminary objection has force and must prevail. We dismiss the appeal with costs.

V.B./R.K.

*Appeal dismissed.***A. I. R. 1918 Allahabad 403 (1)**

BANERJI, J.

Khairati—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 562 of 1917, Decided on 16th August 1917, from order of Sess. Judge, Benares.

Penal Code (1860), S. 420—Prosecution must show that accused deceived complainant.

In a case under S. 420, Penal Code, it is for the prosecution to show that the accused deceived the complainant by making a false and dishonest representation, and not for the accused to prove that he did not act dishonestly. [P 403 C 2]

Satya Chandra Mukerji—for Applicant.

R. Malcomson—for the Crown.

Judgment.—The applicant *Khairati* sold four tins to the complainant *Gaya Prasad*, which he said contained German dye. One of the tins was opened and was found at the time of the sale to contain genuine dye. Subsequently to his purchase *Gaya Prasad* opened another tin and found that it contained alum. He bored holes in the other two tins and those tins also were found to contain alum. *Khairati* was prosecuted and was convicted under S. 420, I. P. C. *Khairati's* defence was that he had purchased the tins at *Amritsar* in the condition in which he sold them and that he was not aware that three of the tins did not contain German dye. He adduced evidence to prove that he purchased four tins at *Amritsar*. Of course the witness could not identify the particular tins but he

did prove that four tins which were alleged to contain dye had been sold to *Khairati*. It is probable that *Khairati* himself was the victim of a fraud. The learned Sessions Judge says that it was for him to prove that in selling the tins to *Gaya Prasad* he did not act dishonestly. I cannot agree with this view. It was for the prosecution to show that *Khairati* had deceived *Gaya Prasad* by making a false and dishonest representation. Upon a consideration of all the circumstances it is impossible to say that there was no reasonable doubt as to the guilt of the accused. He was therefore entitled to the benefit of that doubt. I allow the application, set aside the conviction and sentence and direct that *Khairati* be at once released. The fine, if paid, will be refunded.

V.B./R.K.

*Conviction quashed.***A. I. R. 1918 Allahabad 403 (2)**

RICHARDS, C. J. AND BANERJI, J.

Inayatullah Khan—Decree-holder—Appellant.

v.

Hashmatullah Khan—Judgment-debtor—Respondent.

Exec. First Appeal No. 379 of 1917, Decided on 16th April 1918, from decree of 1st Addl. Sub Judge, Aligarh.

Compromise decree—Plaintiff required to deposit certain sums in Court within certain period—Remittance by money order held did not amount to deposit—Hypothecated property held liable to be sold but remittance not being payment under compromise plaintiff could not execute decree.

A compromise decree provided that after the expiry of a certain period the defendant would sell to the plaintiff certain property for a certain sum. The plaintiff was to pay or deposit in Court the price of the stamp, registration fee and a sum of Rs. 15 by the 1st May and if he did not do so, his claim was to stand dismissed with costs. The compromise decree also contained a provision that an agreement was to be executed within three months from its date containing the terms of the compromise. Such an agreement was in fact executed by the defendant and it contained a hypothecation of the very property which was to be sold to the plaintiff in order to secure the due fulfilment of the conditions of the compromise decree by the defendant. The plaintiff did not tender or pay in cash to the defendant the price of stamp etc., but he remitted by money order a sum which was sufficient to cover those items. The money was paid into the Post Office on the 10th April but on the 6th June the plaintiff got back the money order with a notification that the defendant had refused to accept it on the 21st May. The plaintiff applied for execution of the compromise decree and asked for the realisation of

his claim as a simple money decree by sale of the mortgaged property.

Held: (1) that the mortgage was a mere collateral security for the due fulfilment of the conditions of the compromise by the defendant and that the plaintiff was entitled to have the property sold to realise his claim as a simple money decree; (2) but that the remittance sent by the plaintiff was not a payment within the meaning of the compromise so that the plaintiff was not entitled to execute the decree at all. [P 404 C 2; F 405 C 1]

B. E. O'Connor and Tej Bahadur Sapru—for Appellant.

Iqbal Ahmed—for Respondent.

Judgment.—This appeal arises out of an application for execution of a compromise decree. The compromise decree was a very peculiar one. It was made in a suit for dower brought by the plaintiff as one of the heirs to his daughter for a proportionate share of her dower. The compromise decree provided that after the expiration of ten years the defendant would sell to the plaintiff certain property for the sum of Rs. 12,000 made up as in the compromise is set forth. The compromise decree contained a curious provision that the plaintiff was "to pay or deposit" in Court the price of the stamp, registration fee and another sum of Rs. 15 by the 1st May, and that if he did not do so his claim should stand dismissed with costs except for the sum of Rs. 700 due to one Badam Singh. The plaintiff did not tender or pay in cash to the defendant the price of stamp, the registration fee or the sum of Rs. 15, but he remitted by money order a sum which we may take to be sufficient to cover those items. The money was paid into the Post Office on the 10th April and should no doubt under ordinary circumstances have reached the defendant before the 1st May. The plaintiff got back the money order on the 6th June, with a notification that the defendant had refused to accept it on the 21st May.

The compromise decree also contained a provision that an agreement was to be executed within three months from its date containing the terms of the compromise. Such an agreement was in fact executed by the defendant and it contained a hypothecation of the very property which was to be sold to the plaintiff in order to secure the due fulfilment of the conditions of the compromise decree by the defendant. In the application for execution the plaintiff alleged that under the terms of the compromise

decree if there was default on the part of the defendant he should be entitled to execute the decree for the sum of Rupees 5,150 with interest at the rate of eight annas per cent. per mensem and for Rs. 700 paid to Badam Singh, and his application was for such execution and asked for the sale of the property. (It is quite possible that the plaintiff considered under the terms of the compromise decree that he was entitled to put up the property for sale as if it had been mortgaged.) Two objections were taken in the Court below by the defendant. In the first place it was contended that the stamp, registration fee and the Rs. 15 were neither "paid or deposited" before 1st May 1917, and that consequently the plaintiff on the terms of the decree itself lost all rights thereunder. It is next contended that having taken a mortgage of the property the property could not be brought to sale except by proceedings in a suit under the mortgage. The Court below decided both of these objections in favour of the defendant and dismissed the application for execution altogether. The decree-holder comes here in second appeal.

We doubt much whether the Court was right in holding that the property could not be sold because of the mortgage which was executed by the judgment-debtor. This mortgage was merely collateral security for the due fulfilment of the conditions of the compromise by the defendant. We think that if there had been no other objection the plaintiff would have been entitled to have had the property sold to realise his claim as a simple money decree. The law as to bringing to sale property upon which a party has a mortgage is now regulated by O. 34, R. 14, Civil P. C. and mortgaged property can be brought to sale so long as the claim does not arise "under the mortgage." The present claim would be a claim under the decree and not a claim under the mortgage. The next objection seems more serious. The Court has to execute the decree as it stands. The decree undoubtedly contains a provision that if the plaintiff failed to pay or deposit in Court the price of stamp, registration fee and the sum of Rs. 15, his claim should be dismissed except as to the sum of Rs. 700 due to Badam Singh. We find it impossible to hold that the mere remitting of a money order

which so far as the evidence goes was not only not accepted but did not even reach the defendant until after the prescribed period is a payment within the meaning of the clause in the decree. We think that the view taken by the Court below that this was a fatal objection to the execution of the decree for the Rs. 5,150 and interest was correct. The Court seems to have overlooked the fact that the plaintiff was entitled notwithstanding the non-payment of the registration fee etc., to execute his decree for Rs. 700. We allow the appeal to this extent that we modify the order of the Court below by declaring that the plaintiff is entitled to execute his decree for the sum of Rs. 700 paid to Badam Singh. With this declaration we remand the case with directions to proceed with execution having regard to what we have stated above. We direct the parties to pay their own costs in both Courts,

V.B./R.K.

Case remanded.

A. I. R. 1918 Allahabad 405

BANERJI AND TUDBALL, JJ.

Buddhu Misir and others—Decree-holders—Applicants.

v.

Bhagirathi Kuar—Judgment-debtor—Opposite Party.

Civil Revn. No. 65 of 1917, Decided on 25th July 1917, against order of Dist. Judge, Ghazipur, D/. 10th January 1917.

(a) Civil P. C. (1908), O. 21, R. 95 and S. 146—Transferee from auction-purchaser can apply for possession of property transferred.

A transferee from an auction-purchaser is competent to apply for possession of the property transferred under O. 21, R. 95 and S. 146, Civil P. C. [P 405 C 1]

(b) Civil P. C. (1908), S. 115—Revision—Non-complicated question of fact or law—Applicant entitled to obtain possession under O. 21 R. 95, Civil P. C.—High Court will interfere though another remedy open—Civil P. C. O. 21 R. 95.

Where there is no complicated question of fact or law and the applicant is clearly entitled to obtain possession under O. 21, R. 95, Civil P. C., the High Court will exercise its power of revision in his favour, notwithstanding the fact that there is another remedy open to the applicant.

[P 405 C 2]

Tej Bahadur Sapru and K. K. Varma for Applicants.

S. A. Raoof—for Opposite Party.

Judgment.—The facts out of which this application for revision arises are these: In execution of a decree held by *Buddhu Misir and others*, the present

applicants, the property of the judgment-debtor was sold by auction and was purchased by one Sukh Narain. The auction purchaser sold the property purchased by him to the decree-holders. The decree-holders purchasers applied for delivery of possession under O. 21, R. 95, Civil P. C. The Court of first instance granted their application. An appeal was preferred to the District Judge and he held that the applicants for possession, who were purchasers from the auction-purchasers, were not entitled to make an application under O. 21, R. 95, and accordingly set aside the order of the Court of first instance. From this order of the learned District Judge the present application for revision has been preferred and it is contended that the learned Judge had no jurisdiction to entertain an appeal from the order of the Court of first instance. The contention is fully supported by the ruling of the Full Bench in the case of *Bhagwati v. Banwari Lal* (1). That was no doubt a case under S. 318, Civil P. C., 1882; but the place of that section has been taken by O. 21, R. 95 of the present Code. It is clear therefore that the Court below acted without jurisdiction in entertaining an appeal from the order of the Court of first instance.

Moreover, in our opinion, in view of the language of S. 146, Civil P. C., the applicants were entitled to maintain their application, though they were transferees from the auction-purchaser and were not themselves the auction-purchasers. On behalf of the opposite party we are asked not to interfere, as it is the practice of this Court not to exercise its powers of revision in cases in which another remedy is open to the applicants, that remedy being a suit for possession. No doubt ordinarily this Court would not interfere in revision in a case where a remedy is open to a party. But as observed in *Ram Narain v. Muhammad Shah* (2) each case must be judged upon its peculiar circumstances. In the present case there were no complicated questions of fact or law, and the applicants were clearly entitled to obtain possession by virtue of their purchase from the auction-purchasers. We allow the application, set aside the order of the Court below and restore that of

1. (1909) 81 All 82=1 I O 416.

2. A I R 1914 All 284=26 I O 62.

the Court of first instance with costs in all Courts.

V.B./R.K. *Application allowed.*

A. I. R. 1918 Allahabad 406 (1)

BANERJI, J.

Harnam Singh and another — Applicants.

v.

Emperor — Opposite Party.

Criminal Revn. No. 192 of 1918, Decided on 23rd May 1918, from an order of Sess. Judge, Mainpuri.

Penal Code (1860), Ss. 172 and 406—Property attached in execution of decree kept in custody of accused—Accused not producing property on demand — Accused held guilty under S. 172 and not under S. 406.

Certain moveable property was attached in execution of a decree. The officer of the Court who made the attachment placed the property in charge of the accused. When the time for auction sale of the property arrived notice was issued to the accused to produce the property. They evaded service of the notice on several occasions and the property was not produced:

Held: (1) that the accused could not be convicted of criminal breach of trust under S. 406, inasmuch as the property had not been misappropriated or converted to the use of the accused, nor had it been used or disposed of in any manner contrary to the terms of the trust;

(2) that the accused were guilty of contempt of Court under S. 172. [P 406 C 1, 2]

Satya Chandra Mukerji—for Applicants.

R. Malcomson—for the Crown.

Judgment.—The applicant in this case has been convicted under S. 406, I. P. C. What happened was this. Certain moveable property was attached in execution of a decree. The officer of the Court who made the attachment placed the property in charge of the accused. When the time for auction-sale of the property arrived, notice was issued to the accused to produce the property. They evaded service of the notice on several occasions and the property was not produced. For this they have been held to be guilty of criminal breach of trust. The accused were no doubt entrusted with the attached property, but they would not be guilty of criminal breach of trust unless they dishonestly misappropriated or converted the property to their own use or dishonestly used or disposed of it in violation of any direction of law describing the mode in which the trust which they undertook was to be discharged. In the present case the property was not misappropriated or converted to the use of the accused, nor was it used or disposed of in any manner

contrary to the terms of the trust. Therefore they could not be convicted under S. 406. They were no doubt guilty of contempt of Court and their offence amounted if at all, to one under S. 172, I. P. C. For this they could only be sentenced to one month's simple imprisonment. They have already undergone rigorous imprisonment for nearly three weeks. The result is that I set aside the conviction, acquit the accused of the offence under S. 406 and convict them under S. 172, I. P. C. The imprisonment already undergone is more than sufficient for their conviction under this section. The sentence of fine is remitted and the accused need not surrender to their bail. The fine if paid must be refunded.

V.B./R.K. *Conviction altered.*

A. I. R. 1918 Allahabad 406 (2)

RICHARDS, C. J. AND BANERJI, J.

Mt. Narain Dei—Appellant.

v.

Mt. Parmeshwari and others—Respondents.

First Appeal No. 69 of 1917, Decided on 7th November 1917, from an order of Dist. Judge, Moradabad, D/- 3rd April 1917.

Succession Certificate Act (7 of 1889), S. 7—Hindu widow should not be ordinarily ordered to furnish security.

In the absence of any exceptional circumstances, a Hindu widow who is entitled to a succession certificate to collect the debts due to her deceased husband ought not to be called upon to find security as a condition precedent to getting the certificate. [P 407 C 1]

Radha Kant Malaviya—for Appellant.

Raza Ali—for Respondents.

Judgment.—This appeal arises out of an order of the District Judge rejecting the application of the appellant for a certificate to collect debts under Act 7 of 1889. Umrao Singh was the husband of the appellant. He died leaving (1) his widow, (2) the wife of a pre-deceased son, and (3) certain reversioners him surviving. The application of the widow was opposed by the reversioners and the daughter-in-law. An order was made by Mr. Allen, granting a certificate conditional upon the widow giving security to the extent of the debts covered by the certificate which was asked for. There appears to have been some allegation by the opposite party that the debts due to the deceased were greater than those men-

tioned in the application. The lady expressed her inability to give security and eventually her application was rejected. The learned District Judge who finally rejected her application seems to have been of opinion that the first order made by Mr. Allen was under S. 7, Cl. (3), Succession Certificate Act, and that accordingly the Court had no option but to require security to be given. In the present case it is clear that the widow was the person entitled to a succession certificate, and that the order of Mr. Allen was not made under S. 7, Cl. (3). S. 9 deals with the powers of the Court as to directing security. It provides that the District Judge shall, in any case in which he proposes to proceed under S. 7, Cl. (3), or Cl. (4), require that security must be given by the person to whom the certificate is granted.

The Court has also a discretion in any other case to require security to be given. The real question which we have to decide in the present case is whether or not, when a widow is admittedly entitled to the certificate and all the moneys covered by the succession certificate are assets of her deceased husband, she ought to be called upon to give security. It is not alleged in the present case that there are any exceptional circumstances. There is the mere fact that she is the widow and a purdahnashin lady. It seems to us quite clear that if the deceased had died leaving a sum of money equal to the debts in his house, or if the widow had been successful in collecting a similar amount after the death of her husband, the reversioners would not be listened to, if they came into Court asking that the widow's rights as a Hindu widow should be restrained in any way for the benefit and protection of the reversioners on the mere allegation that she might waste the corpus. If this view be correct, it seems to us that there is no reason why the reversioners should get exactly the same relief by compelling the widow to find security as a condition precedent to getting a certificate to collect debts. We do not say that there may not, in some cases, be special circumstances which might justify the Court in directing security to be given even in the case of a Hindu widow. We allow the appeal, set aside the order of the Court below and direct that the certificate do issue to the appellant. The appellant must have her costs

to be paid by the respondents in all Courts.

V.B./R.κ.

Appeal allowed.

A. I. R. 1918 Allahabad 407

KNOX, J.

Khubi and others—Applicants.

v.

Bakhtayal—Opposite Party.

Criminal Revn. No. 194 of 1918, Decided on 25th April 1918, from order of Dist. Magistrate, Meerut.

Criminal P. C. (1898), S. 522—Order for possession refused on ground of delay but passed by District Magistrate in appeal held proper.

An application for an order for possession under S. 522 filed after the conviction of the accused was rejected by the trying Magistrate but was allowed on appeal by the District Magistrate:

Held: that under the circumstances of the case the order was a proper one and should not be interfered with. [P 408 C 1]

*Satya Chandra Mukerji—*for Applicants.

*A. H. C. Hamilton—*for Opposite Party.

Facts.—The accused in a certain case were convicted. After the judgment was delivered, the complainant filed a petition under S. 522, Criminal P. C., for restoration of possession. The trying Magistrate rejected the application on the ground that an order to this effect must be passed simultaneously with the order of conviction. The trying Magistrate was again moved on the ground that such an order was an independent order and could be passed subsequently to the judgment, but admitting this argument he expressed his inability to grant the application having once rejected it on the same facts. On appeal the District Magistrate passed the following order on 4th March 1918:

"Appellant in this case contends that the order of the lower Court in refusing to give possession under S. 522, Criminal P. C., on the ground that he was asked to do so some days after he had passed orders in the original case, is a mistaken one and that the latest ruling on the subject is in favour of the appellant: *Jotindra Nath v. Emperor* (1). I think this is so. The whole tenor of that judgment in Criminal revision is to the effect that if such order proceeds out of the original judgment without fresh material being produced it is not an illegal one. In this case the appellant asked for that form of redress in his original complaint and the lower Court might not have taken cognizance of it. He passed his order in the original case on 20th December 1917. On the 22nd application

was made for action under S. 522, Criminal P. C., which was refused on 3rd January 1918. I think the lower Court in view of the ruling quoted could have and should have issued order under S. 522, Criminal P. C. I allow the appeal and direct that the police be ordered accordingly to give possession over the disputed land to the appellant."

Judgment.—This is an application for revision of an order passed by the District Magistrate of Meerut under S. 522, Criminal P. C., whereby he directed the police to give possession over some disputed land to one of the parties. Whether the District Magistrate has or has not the authority to pass the order in question it seems to me unnecessary to decide. The order which the learned Magistrate has now passed is an order which could and should have been passed long ago. I decline to interfere and dismiss the application. Let the record be returned.

V.B./R.K. *Application dismissed.*

A. I. R. 1918 Allahabad 408

RAFIQUE AND PIGGOTT, JJ.

Ramzan—Plaintiff—Appellant.

v.

Mt. Ram Daiya—Defendant—Respondent.

Second Appeal No. 716 of 1916, Decided on 31st July 1917, against the decision of Dist. Judge, Allahabad, D/- 2nd February 1916.

Hindu Law—Maintenance—Widow—Extent of right—Widow's right to residence and maintenance is in reference to property existing at time of her husband's death.

Where a right of residence or maintenance comes into existence in favour of the widow of a man who was lately a member of a joint undivided Hindu family, she takes that right in the property as it stands at the time of her husband's death. She cannot set up her right of maintenance or residence as against alienations effected during the lifetime of her husband. [P 409 C 1]

S. M. Sulaiman—for Appellant.

Gokul Pershad—for Respondent.

Judgment.—This second appeal by plaintiff in a suit for ejectment arises under the following circumstances: There was a joint Hindu family consisting of a father Shanker and his son Ram Charan. Shanker mortgaged a certain house, which formed part of the ancestral family property and in which it would seem that he and his son were residing, although it is not clear that this point has been specifically considered by the Courts below, by a simple mortgage in favour of one Mt. Dhan Devi. Ram Charan died after this mortgage had been contracted, leav-

ing him surviving a widow Ram Daiya, who is the defendant-respondent in this case. Shanker subsequently sold $\frac{3}{4}$ th share of the house in question to the plaintiff Ramzan. The latter induced the mortgagee to accept redemption of this share on payment of $\frac{3}{4}$ th of the mortgage debt. After this Mt. Dhan Devi, the mortgagee, brought a suit for sale against Shanker, who had now become by survivorship the sole owner of the entire house. She obtained a decree for the sale of the remaining $\frac{1}{4}$ th share of the house in satisfaction of $\frac{1}{4}$ th of the original mortgage debt. This decree the plaintiff Ramzan, who had already become the owner of the remaining $\frac{3}{4}$ th share of the house, purchased from Mt. Dhan Devi. He took out execution, brought this $\frac{1}{4}$ th share to sale and purchased it himself. On attempting to take possession of what he had purchased he was resisted by the defendant Mt. Ram Daiya. Hence this present suit, in which the plaintiff claims actual possession of the share of the house purchased by him at the auction, along with an injunction restraining the defendant from interfering with his possession. The suit has been resisted simply on the ground of defendant's right of residence in the ancestral family home as a Hindu widow.

The first Court overruled this contention and decreed the claim. The learned District Judge held that the question of the defendant's right of residence was dependent upon the question whether or not the original alienation, that is to say, the mortgage by Shanker of the entire house, had been made for legal necessity. He remitted an issue on this point, and on receiving a finding that legal necessity was not proved, he has dismissed the plaintiff's suit altogether. The plaintiff comes to this Court in second appeal. The decision of the lower appellate Court is certainly unfair to the plaintiff to some extent, as the latter was at least entitled to formal possession, subject to the alleged right of residence of the defendant for her lifetime. On the decree of the lower appellate Court as it stands, it is difficult to see how the plaintiff can ever enforce his proprietary rights hereafter. We are asked, however, by the plaintiff to consider the question whether his suit ought not to have been decreed as brought. In our opinion it ought to have been decreed. We have been referred to a great deal of

case-law on the subject of a Hindu widow's right of residence and maintenance. It is unnecessary to go into the principles laid down by these decisions. The point in the present case is that, at the time of the original alienation from which the present plaintiff eventually derives his title, that is to say, the mortgage by Shankar of the entire house, the present defendant was not a Hindu widow. She was the wife of Ram Charan and was living with him and with her father-in-law.

The decision of this Court in the case of *Ajudhia Prasad v. Jasoda* (1) shows the distinction to be drawn between alienation effected to the prejudice of the existing rights of maintenance and residence in favour of widowed ladies depending upon a joint family, and alienations effected by the male members of a family in connection with which a right of residence or maintenance is set up by a lady who was bound at the time by the action of her husband and who claims to have become entitled to residence or maintenance, since the date of the alienation, by reason of her husband's death. Some of the arguments addressed to us on behalf of the respondent in this case have really called in question the correctness of this decision. We can only say that we are not prepared to reconsider it. It seems reasonable to say that, when a right of residence or maintenance comes into existence in favour of the widow of a man who was lately a member of a joint undivided Hindu family, she takes that right in the property as it stands at the time of her husband's death. She cannot set up her right of maintenance or residence as against alienations effected during the life time of her husband. Now what the learned District Judge has called upon the plaintiff to prove in the present case is that the mortgage effected by Shankar was binding upon his son Ram Charan. This is precisely the plea which a Bench of this Court refused to allow a widowed daughter-in-law, in the position of the present defendant to set up in the case of *Sohni v. Mohan Kuer* (2). If the defendant cannot plead that the alienation made by Shankar did not bind Ram Charan, that is to say, did not affect the rights of Ram Charan in the house in question, then it is impossible to see why

she should not be just as much bound by the alienation as she would have been if Ram Charan had concurred in making it.

The issue remitted by the learned Judge raised a question which might have been litigated upon an objection taken by Ram Charan himself, but which this Court refused to allow to be taken by a person in the position of Ram Charan's widow. We must hold, therefore, that the principle of the decision in *Ajudhia Prasad v. Jasoda* (1) governs the present case, and as we are not prepared to dissent from it or reconsider it, we must allow this appeal. We do so accordingly. We set aside the decree of the lower appellate Court and restore that of the Court of first instance, with costs throughout, including fees in this Court on the higher scale.

V.B./R.K.

Appeal allowed.

A. I. R. 1918 Allahabad 409

KNOX, J.

Sahadeo Rai—Accused—Applicant.

v.

Emperor—Opposite Party.

Criminal Ref. No. 237 of 1918, Decided on 23rd April 1918, made by Sess. Judge, Ghazipur.

Penal Code (45 of 1860), S. 173—Service—Tender of summons is sufficient—Refusal to receive summons is no offence.

Under the Criminal Procedure Code the mere tender of a summons is sufficient to effect service. A refusal to receive the summons does not therefore expose a person to the penalty provided by S. 173. [P 410 C 1]

FACTS appear from the following order of reference made by the Sessions Judge:

"This is an application for revision of the order dated 7th February 1918, of Maulvi Mahammad Wajib, Magistrate, 1st Class of Ballia, who convicted Sahdeo Rai under S. 173, I. P. C. and sentenced him to pay a fine of Rs. 10, on the ground that on 10th December 1917 he had refused to take the notice which Mahdeo Ram constable wanted to serve on him. In the Deputy Magistrate's opinion this act of Sahdeo Rai amounted to intentional prevention of service on himself. It seems to me that this is not the object of S. 173, I. P. C. The refusal to receive a summons is not an offence under S. 173, if the actual delivery was not legally necessary to complete its service. Under the Criminal Procedure Code the mere tender of a summons is sufficient and a refusal to receive does not expose one to the penalty of S. 173 (1). I cannot agree with the Deputy Magistrate that the accused intentionally prevented the service of the notice on himself by refusing to receive it. The Deputy Magistrate seems to have misconceived the scope of S. 173. I would therefore report this case under S. 488, Criminal P. O., to the Hon'ble

1. (1887) A W N 279.

2. (1912) 18 I C 944.

High Court with the recommendation that the order of the Deputy Magistrate above referred to be set aside as illegal and that the applicant be acquitted of the offence under S. 173. The fine if already paid may also be ordered to be refunded to the applicant. Before the record is submitted to the High Court the Magistrate will be asked to furnish an explanation."

Judgment.—The reference made has been properly made. No offence under S. 173, I. P. C., has been committed. I set aside the conviction and direct that the fine or any part of it which has been paid be refunded. The sentence of imprisonment has been served.

V.B./R.K. *Reference accepted.*

A. I. R. 1918 Allahabad 410

PIGGOTT AND WALSH, JJ.

Mahomed Isa Khan—Plaintiff—Appellant.

v.

Mahomed Khan—Defendant—Respondent.

Second Appeal No. 1793 of 1915, Decided on 23rd July 1917, against the decision of Second Addl. Judge, Aligarh, D/. 17th August 1915.

(a) **Agra Tenancy Act (1901), S. 158**—Applicability—Section applies to piece of grove land ceasing to be grove more than twelve years before Act of 1901 came into force.

The provisions of S. 158, Tenancy Act, apply to a piece of grove land originally contained in a tenancy, but which ceased to be a grove more than twelve years before the coming into force of the Agra Tenancy Act of 1901. [P 411 C 2]

(b) **Agra Tenancy Act (1901), Ss. 4 and 158**—Admitted tenancy—Land in S. 158 includes land other than land as defined in S. 4.

Per Walsh, J.—In the case of an admitted tenancy the word "land" in S. 158 of the Agra Tenancy Act must be held capable of including land other than land as defined in S. 4 of the Act. [P 412 C 1]

S. M. Sulaiman and M. L. Agarwala—for Appellant.

Iqbal Ahmad—for Respondent.

Piggott, J.—This is a second appeal by the plaintiff in a suit for resumption brought under the provisions of Ch. 10, Tenancy Act (Local Act No. 2 of 1901). The Court of first instance found that the whole of the area specified at the foot of the plaint had been held rent free by the defendant for fifty years, and by two successors to the original grantee. It also found that the land was not liable to resumption at the pleasure of the grantor, or under any of the other conditions laid down by S. 154 of the same Act. The learned Assistant Collector however felt himself compelled to draw a distinction between two portions of the area in suit.

With regard to plots of land making up a total area of 7 bighas, which had never been anything but cultivated or culturable land, the finding was that the provisions of S. 158, Tenancy Act, clearly applied and that the defendant must be deemed to hold the same in proprietary right. With regard to the remaining 9 bighas 16 biswas, it was found that this area had at one time been occupied by a grove. This grove had ceased to exist something more than twelve years, probably about fifteen years, prior to the institution of the suit, and during this latter period the land had been under cultivation. The Assistant Collector however in accordance with certain decisions of this Court and also with what appears to be the latest pronouncement of the Board of Revenue on the subject, held that land constituting a grove was not land let or held for agricultural purposes within the meaning of the definition in S. 4, Cl. (2), Tenancy Act 2 of 1901. From this he went on to conclude that the provisions of S. 158 of the same Act could not apply to this area, because it was not shown to have been held for fifty years as "land" within the meaning of the definition above referred to. He went on to conclude that the plaintiff was entitled to have rent assessed on this area, and he framed his decree accordingly. Both parties appealed to the District Judge.

On the main questions in issue the learned Judge has agreed with the first Court. We must accept the findings of fact arrived at, namely that the entire area in suit had as a matter of fact been held rent free for fifty years by the defendant and by at least two successors to the original grantee. We find it also impossible to interfere with the decision of the lower appellate Court that the provisions of S. 154, Tenancy Act, do not apply to any portion of the area in suit. On these findings the appeal of the plaintiff in the Court below against that portion of the decree of the Assistant Collector which was adverse to him was necessarily dismissed. The learned Judge then went on to consider the appeal of the defendant. He was evidently of opinion that the area in suit, forming part of a rent free holding, must necessarily be subject to the provisions of S. 158, Tenancy Act. He endeavoured however to place his decision in the form of a dilemma against the plaintiff. With regard to the area of

9 bighas 16 biswas which the first Court had ordered to be assessed to rent, the lower appellate Court remarks that this area was either part of a rent-free grant or it was not. Supposing, says the learned Judge, that it was not, then the only possible conclusion from the facts is that the defendant had been holding it adversely to the plaintiff for a period of more than twelve years prior to the institution of the suit. There was an appeal to this Court which came in the first instance before Tudball, J.

It may be said at once that it is somewhat difficult to affirm the decision of the lower appellate Court on the precise ground on which it proceeds. The plain fact of the matter is that the land in suit is part of a rent-free grant. The plaintiff himself said so in his plaint and framed his plaint on that assumption. It seems impossible therefore to decide the question on the hypothetical assumption of a state of things which is clearly contrary to the pleading as well as to the ascertained facts. The defendant-respondent nevertheless supports the decision of the Court below on the broad ground that the whole of the area in suit, and not merely part of it, must be held to fall within the provisions of S. 158, Tenancy Act. In this connection the learned Judge of this Court before whom the case first came was asked to reconsider the question of the applicability of the definition of the word "land" already referred to. In view of the decision of a Bench of this Court in *Hadi Hosan Khan v. Pati Ram* (1), as to the correctness of which he evidently entertained serious doubts, Tudball J., referred this case to a Bench of two Judges. The matter has now been fully argued out before us. There seems to have been a long course of decisions in this Court on the definition of the word "land" as applied to groves. An elaborate pronouncement on the subject by Sundar Lal J. is to be found in *Huabitullah v Kalyan Das* (2). In view of the fact that the amendment of the Local Tenancy Act is now under the consideration of the authorities, I am particularly anxious not to reconsider or unsettle, except under pressure of necessity, and principles which seem to have been definitely affirmed by this Court with regard to the provisions of the existing Tenancy Act, nor do I

think that it is really necessary in the present case to determine whether an area covered by trees and forming a grove is not land let or held for agricultural purposes, or even the narrower question whether in Ch. 10, Tenancy Act, or at least in some of the sections falling within that Chapter, it should not be held that there is something repugnant in the context to the application of the strict definition of the word "land". I think that the present case may be quite satisfactorily and most conveniently decided upon its own facts.

The appeal now before us is confined to the area of 9 bighas 16 biswas, which at one time formed a grove. We do not know for certain whether this grove was planted by the original grantee or formed part of the original grant, in the sense that the grant when made was one of a grove along with certain cultivated or cultivable land. In any case there is no suggestion in the pleadings or in the evidence that there was more than one grant. The area in question in this appeal therefore did form part of a rent-free grant in favour of the predecessor-in-title of the present defendant. The grove ceased to exist before the present Tenancy Act, 2 of 1901, came into force. Under the previous Act, namely, the Rent Act 12 of 1881, there was no express definition to the word land, but the provisions of that Act undoubtedly applied to grove just as much as to cultivated or cultivable lands. The area now in suit therefore was always "land" to which the provisions of the Tenancy Act for the time being in force applied. The ruling in *Hadi Hasan Khan v. Pati Ram* (1) cannot possibly be applied to the facts of the present case, because the area in question having been brought into cultivation more than twelve years before the institution of the suit was always "land" within the strict meaning of the definition, both at the time when the present Tenancy Act, 2 of 1901, came into force and right down to the date of the institution of the suit. I think therefore that it is impossible to distinguish as the Assistant Collector endeavoured to do between the two portions of the area in suit. The whole formed a rent-free grant and was subject to the provisions of Ch. 10, Act 2 of 1901 under any possible interpretation of the word "land," because the entire area had always been under cultivation while that Act was in force. If therefore the conditions laid down by

1. (1918) 95 All 280=19 I C 416.

2. A I R 1914 All 428=25 I C 169.

S. 158, Tenancy Act, are proved to have been satisfied in respect of the entire area in suit and it is so found by the lower appellate Court, there seems no valid reason for drawing a distinction against the area now under appeal merely on the ground that it had at one time formed a grove. On this ground alone I would dismiss this appeal with costs, including fees in this Court on the higher scale.

Walsh, J.—I agree. The circumstances of this case are exceptional. I have come to the conclusion that in an admitted tenancy, such as this was, the word land in S. 158 must be held capable of including land other than land as defined in S. 4. It would be "repugnant to the subject," to quote the language of S. 4, to hold that the word "land" in this particular case did not include the land on which this grove had stood. The result of doing so would be that while holding Ch. 10, Tenancy Act, applicable to a tenancy, we should be driven to hold that it did not apply to land which formed the subject of a tenancy, and that I think is the very thing which is meant by the somewhat unusual language in the definition clause, namely, "repugnant to the subject." I wish carefully to guard myself against being taken to hold anything more. In my opinion it by no means follows that all or any groves held for more than fifty years by two successors to the original grantee come within S. 158 or that, for example, S. 11 can be used by an occupant or grove-holder by adopting the usual construction which is the right one in this particular case. It is for that reason that I think it necessary to say that I adopt the very closely reasoned judgment of Hon'ble Mr. Reynolds, the Senior Member of the Board, to be found in the Selected Decisions of the Board of Revenue, No. 4 of 1911, [*Megh Singh v. Mt. Nazar Fatma* (3)]. I think the view there clearly laid down in a series of the propositions which I venture to quote is not only correct but entirely consistent with the view which we are taking:

"The custom generally prevailing in these provinces is that the grove-holder is a tenant paying rent. This was crystallized in the definition of rent and tenant given in S. 4. Groves are in my opinion equally clearly not land as defined in S. 4. If they were land within that definition, there would be no need to differentiate them from land in the definition of rent. If the land-

holder seeks to get rid of a grove-holder, he can not take action under Ch. 10 as that chapter refers to land only. But he may sue to eject under S. 58, as the grove-holder is a non-occupancy tenant."

The Senior Member then goes on to discuss the nature of tenancy and adds: "probably in the majority of cases, either by village custom or by special contract, a grove-holder holds, not from year to year, but so long as the grove exists. In all cases then when a land-holder seeks to eject a grove-holder, the question of the existence of such custom or contract should almost invariably be made a matter in issue. It follows from what I have said that a grove-holder cannot generally acquire rights of occupancy in the land, on which the trees grow."

These statements of the law, which I take to be correct, obviously apply to a vast majority of cases of ordinary tenancy between a grove holder and a land-holder. The case we are dealing with is not one of those ordinary cases. It is a case admittedly of a tenancy wholly independent of and unconnected with a grove as such. It appears to me a mere incident or accident in its history that at one time it became or a portion of it became a grove so as not to be land within the strict definition of the term. I think we are both agreed that that accident does not make it any the less tenancy of land within the meaning of S. 158, and therefore the rights of the parties under that section have been rightly applied.

By the Court.—We dismiss this appeal with costs, including fees in this Court on the higher scale.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1918 Allahabad 412

RICHARDS, C. J. AND BANERJI, J.

Mahomed Ishaq Khan and others—
Plaintiffs—Appellants.

v.

Mahomed Rustom Ali Khan and others—
Defendants—Respondents.

First Appeal No. 3 of 1917, Decided on 9th January 1918, from a decree of Addl. Sub-Judge, Meerut, D/- 30th August 1916.

(a) Civil P. C. (1908), S. 11, Expl. 5, and O. 2, R. 2 and O. 20, R. 12—Suit for possession and mesne profits—Subsequent suit for mesne profits from date of institution of suit up to delivery of possession is not barred.

Plaintiff brought a suit for possession and claimed a certain sum for mesne profits. There was a further claim for mesne profits during the pendency of the suit and after decree. The suit resulted in a decree for possession and for a portion of the sum claimed for mesne profits. The Court did not purport to deal with the question

of mesne profits during the pendency of the suit and after decree. Plaintiff then brought a suit for mesne profits from the date of the institution of the previous suit up to the date of delivery of possession.

Held: that the suit was maintainable and was not barred either by Explan. 5, S. 11 or by R. 2, O. 2. [P 413 C 2]

(b) **Precedents—Value of—Amendment of statute not expressly altering interpretation by previous decisions—They are to be adhered to.**

Where there have been decided cases before an Act is amended, if the amendment does not expressly show that the law as interpreted by the decisions is altered, the rule laid down by the decisions is to be adhered to. [P 413 C 2]

Tej Bahadur Sapru, Kailash Nath Katju and Mohamed Abdullah—for Appellants.

S. F. Ryves, Sunder Lal and Oudh Behari Lal—for Respondents.

Judgment.—This appeal arises out of a suit for mesne profits. A previous suit had been brought in which possession of the land had been claimed. A certain sum of moneys was also claimed as mesne profits for the period prior to the institution of the suit. There was a further claim for mesne profits during the pendency of the suit and after decree. The suit resulted in a decree for the plaintiffs for possession of the land and also a decree for a portion of the amount claimed by the plaintiffs for mesne profits. The rest of the plaintiffs' claim was dismissed. On referring to the judgment, it is quite clear that the Court never dealt or purported to deal with the mesne profits during the pendency of the suit or after decree. In the present suit mesne profits are claimed from the date of the institution of the suit up to the date of delivery of possession. The defence is that the decree in the previous suit operates as *res judicata*, and reliance is placed upon the provisions of S. 11, Explan. 5. S. 11 provides that

"no Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties... in a Court competent to try such subsequent suit."

Explanation 5 provides that "any relief claimed in the plaint which is not expressly granted by the decree shall for the purposes of this section be deemed to have been refused."

This explanation corresponds exactly with Explan. 3, S. 13 of the old Code. Reliance is also placed upon the provisions of O. 2, R. 2, which provides that "every suit shall include the whole of the claim

which the plaintiff is entitled to make in respect of the cause of action."

The contention on behalf of the defendant is that the Court, in the previous suit not having granted mesne profits during the pendency of the suit and from the date of the decree up to the date of delivery of possession, must be deemed to have refused it. Further, the decree ought to be interpreted as having expressly dismissed the suit in respect of mesne profits save to the extent that mesne profits were granted. The very same question had frequently arisen in the High Courts in India before the coming into operation of the present Code of Civil Procedure. All the Courts appear to have held that notwithstanding the provisions of the old Code a suit for mesne profits *pendente lite* and from the date of decree to delivery of possession could be maintained. This was expressly held in the case of *Ram Dayal v. Madan Mohan Lall* (1). In that case just like the present there had been in a previous suit a claim for mesne profits prior to the institution of the suit and also future mesne profits. Nevertheless the Court held that the subsequent suit for mesne profits from the date of the institution of the suit up to delivery of possession could be maintained when the Court in the previous suit had not decided the right of the plaintiff to these mesne profits. We think that we are bound to follow this decision, unless it is shown that the legislature when enacting the present Civil Procedure Code altered the law. It is a recognized rule that where there have been decided cases before an Act is amended, if the amendment does not expressly show that the law as interpreted by the decisions is altered, the rule laid down by the decisions is to be adhered to. We now propose to consider whether the provisions of the Civil Procedure Code 1908, altered the law in respect of the matter with which we are dealing. S. 211, Civil P. C. 1882 provided that

"in a suit for the recovery of possession of immovable property yielding rent or other profit the Court may provide in the decree for the payment of rent or mesne profits in respect of such property from the institution of the suit until the delivery of possession to the party in whose favour the decree is made".

It is to be noted that in this section there is no reference to the claim in the plaint being made for mesne profits.

S. 212 provided that whether the suit was a suit for

"possession of immovable property and for mesne profits which have accrued on the property during the period to the institution of the suit, and the amount of such profits is disputed, the Court may either determine the amount by the decree itself, or may pass a decree for the property and direct an inquiry into the amount of mesne profits, and dispose of the same on further orders."

The provisions of these two sections seem to have been amalgamated in the provisions of O. 20, R. 12, of the new Code. That order provides that

"where there is a suit for the recovery of possession of immovable property and for rent or mesne profits, the Court may pass a decree (a) for possession of the property, (b) for the rent or mesne profits which have accrued on the property during the period prior to the institution of the suit or directing an enquiry as to such rent or mesne profits, and (c) directing an enquiry as to the rent or mesne profits from the institution of the suit until (i) the delivery of possession to the decree-holder, (ii) the relinquishment of possession by the judgment-debtor with notice to the decree-holder through the Court, or (iii) the expiration of three years from the date of the decree, whichever event first occurs."

Clause 2 of this rule provide;

"Where an enquiry is directed under Cl. (b) or Cl. (c), a final decree in respect of the rent or mesne profits shall be passed in accordance with the result of the enquiry."

Under the old Code the practice was that excepting those cases in which the Court had actually found a certain amount due for mesne profits, the Court executing the decree used to be called upon to make an enquiry and to ascertain in execution the amount of mesne profits, whether they were mesne profits which had accrued prior to the institution of the suit or mesne profits which had accrued between that date and the delivery of possession. The authority to make this enquiry was conferred on the Court executing the decree by S. 244, Civil P. C. 1882, to which we shall presently refer. It would seem therefore that the only substantial change that has been made in the law is that it is the Court which hears the suit which is to ascertain the mesne profits, whether those mesne profits be mesne profits which accrued before the institution of the suit or afterwards up to the date of delivery of possession, and it is this Court which is to make the final decree for mesne profits which has to be executed by the Court executing the decree. We do not think that any significance is to be attached to the fact that in S. 211 of the old Code there is no reference to a claim for mesne

profits or to the fact that O. 20, R. 12, purports to deal with suits in which mesne profits are claimed. S. 244 of the old Code dealt with certain matters which were to be determined by the Court executing the decree, and not by a separate suit, and amongst other questions the very first mentioned were questions regarding the amount of any mesne profits as to which the decree had directed an inquiry. There is a proviso at the end of the section in the following words:

"Nothing in this section shall be deemed to bar a separate suit for mesne profits accruing between the institution of the first suit and the execution of the decree therein, where such profits are not dealt with by such decree."

The corresponding section of the Code of 1908 is S. 47. In this section reference to all questions of mesne profits is omitted and the proviso which we have quoted from S. 244 is also omitted. The argument is that this last mentioned omission is most significant and that it demonstrates the intention of the legislature that suits for the recovery of mesne profits after a previous suit for possession cannot be maintained. A little consideration shows that this argument is not so forcible as might appear at first sight. The proviso to S. 244 of the old Code seems to have presumed that there was nothing in the Code itself which would prevent a second suit for mesne profits but that it might be contended that the provisions of S. 244 would preclude a second suit, and accordingly the words of the proviso are, not that nothing "in the Code" shall be deemed to bar a separate suit for mesne profits, but that nothing "in the section" shall be deemed to bar such a suit. It becomes apparent that the retention of this proviso in the new Code would have been altogether meaningless and out of place, because in S. 47 of the new Code there is no reference to inquiries as to mesne profits at all and O. 20, R. 12, to which we have already referred, expressly takes away the jurisdiction of the Court executing the decree to make any inquiry in respect of mesne profits. The learned Judge in the Court below has referred to the report of the Select Committee on the provisions of the contemplated amendment of the Code of Civil Procedure. If it were permissible to consider the report at all, the inference would seem to be

rather against the respondents than in their favour. The question had reference to a Bill which was subsequently withdrawn. In this Bill there was a provision which would have made it quite clear that a second suit for mesne profits could not be maintained. This provision does not find a place in the measure which was actually enacted. If any legitimate inference could be drawn at all, it would seem as if the legislature knowing well the course of decisions in the Courts in India had come to the conclusion that it was best to maintain the rule of law as established by the cases.

In this connexion it may not be altogether out of place to suggest that there are some practical difficulties in the way of ascertaining mesne profits pendente lite and particularly future mesne profits in the original suit. Where there are more defendants than one, their liability may not altogether be the same and the final ascertainment of the amount due for mesne profits from the date of the decree to the time of delivery of possession can never be made until possession is actually taken by relinquishment on the part of the defendants or through the Court. We may mention here that the question recently arose in the Madras High Court in the case of *Doraisami Aiyar v. Subramania Aiyar* (2), in which the majority of a Full Bench of that Court were of opinion that notwithstanding the provisions of the new Code a suit for mesne profits like the present could be maintained.

We allow the appeal, set aside the decree of the Court below and remand the case to that Court with direction to re-admit the suit in its original number and to proceed to hear and determine the same according to law. The appellants will have their costs of this appeal; including fees on the higher scale. Other costs will follow the event.

V.B./R.K. *Appeal decreed.*

A. I. R. 1918 Allahabad 415 (1)

BANERJI AND RYVES, JJ.

Jwala Prasad and another—Plaintiffs—Applicants.

v.

E. I. Ry. Co.—Defendants—Opposite Parties.

Civil Revn. No. 18 of 1918, Decided on 16th May 1918.

Civil P. C. (1908), O. 7, R. 10 and S. 115—Order for presentation to proper Court confirmed on appeal—No. second appeal lies—Appellate Court committing error in exercise of jurisdiction—High Court will not interfere in revision.

No second appeal lies against an order of a District Judge confirming an order of the trial Court directing the return of a plaint for presentation to the proper Court.

If in the exercise of his jurisdiction in deciding an appeal from an order of the trial Court returning a plaint for presentation to the proper Court, the District Judge commits an error, that does not give the aggrieved party a right to apply to the High Court in revision under S. 115.

[P 415 C 2]

B. M. Vyas—for Applicants.

Ladli Prasad Zutshi—for Opposite Parties.

Judgment.—The plaintiffs brought a suit against the E. I. Ry. Co. in the Court at Cawnpore for recovery of certain money deposited by them with the Railway Co. in Calcutta. The Subordinate Judge held that the Cawnpore Court had no jurisdiction to entertain the suit and ordered the plaint to be returned for presentation in the proper Court. An appeal was preferred from this order to the District Judge and the learned District Judge affirmed the decision of the Court of first instance. This is an application for revision of the appellate order of the District Judge. Admittedly no appeal lies from such an order. It is also admitted that the District Judge had jurisdiction to entertain the appeal before him. If in the exercise of his jurisdiction he committed an error (we do not hold that he did so), that does not give the applicants a right to apply in revision under S. 115 of the Code of Civil Procedure. In our opinion this application cannot be entertained. We accordingly dismiss it with costs.

V.B./R.K. *Application rejected.*

A. I. R. 1918 Allahabad 415 (2)

BANERJI, J.

Emperor

v.

Babu Prasad and another—Accused—Opposite Parties.

Criminal Ref. No. 709 of 1917, Decided on 22nd September 1917, made by Sess. Judge, Moradabad

(a). Criminal P.C. (1898), Ss. 478 and 476—Civil Court making inquiry under S. 478 should proceed as Magistrate proceeds in inquiry into case before commitment.

A civil Court making an inquiry under S. 478, Criminal P. O., should proceed in the same way as a Magistrate would do in inquiring into a case

before commitment, i. e., it should take the evidence of the witnesses for the prosecution in presence of the accused and then examine the latter, and having done this should frame the charge sheet and after explaining the same to the accused should record the order of commitment.

[P 416 C 2]

(b) Criminal P. C. (1898) Ss. 478 and 476—Munsif taking action under S. 476 and after giving notice and receiving written statements deciding to commit accused under S. 478—On day fixed for inquiry Munsif framing charge after recording brief statements committing accused—Procedure is illegal.

A Munsif came to the conclusion that a receipt filed before him was forged. He accordingly took action under S. 476 and after giving notice to the accused and receiving their written statements decided to commit the accused under S. 478 of the Code. On the date fixed for inquiry under S. 478 the Munsif framed charge sheets and after recording very brief statements of the accused committed them for trial;

Held: that the procedure adopted by the Munsif was irregular and illegal.

[P 417 C 1]

R. K. Malaviya—for Opposite Parties.

FACTS of the case appear from the following Referring Order by the Sessions Judge:

In this case two persons have been committed to this Court by Pandit Rup Kishan Agha, Munsif of Chandausi. One is Babu Prasad, who is charged with offences under Ss. 196 and 471, 467, I. P. C., while the other is Chander Sen, who is charged with an offence under S. 467, I. P. C. The Munsif seems to have acted under S. 478, Criminal P. C., but he has not followed the proper procedure as laid down in that section. It appears that Babu Prasad, who was the defendant in a Small Cause Court suit, pleaded satisfaction and filed a receipt in support of the alleged satisfaction. In order to prove his plea he himself gave evidence and examined Chander Sen, the scribe of the receipt. The Munsif came to the conclusion that the receipt was forged. He accordingly took action under S. 476, Criminal P. C., and on 31st May 1917, passed an order to that effect and fixed 18th June for inquiry. Babu Prasad, who was apparently present, was informed of this order and notice was issued to Chander Sen calling upon him to show cause why he should not be committed. On 18th June Babu Prasad filed a written statement but Chander Sen was absent. A fresh notice was ordered to be issued to him for 3rd July, after statements of one Baldeo Sarup, Mukhtar and Babu Prasad (both on oath) had been recorded. On 3rd July, Chander Sen filed a written statement. Some copies were

put in on behalf of Ram Kishan Das (plaintiff) and inquiry was adjourned to 14th July. On 14th July same records were perused and the inquiry was adjourned to 17th July. On 17th July the Munsif decided to commit the accused under S. 478, Criminal P. C., instead of sending them to a Magistrate under S. 476, Criminal P. C., and fixed 23rd July for inquiry.

On 23rd July charge sheets were framed and very brief statements of the accused were recorded and the accused were committed for trial. The record was sent to this Court direct but as it should have been sent to the District Magistrate under S. 479, Criminal P. C., it was returned. The District Magistrate has now sent the record together with the calendar to this Court.

The calendar contains the names of five witnesses for the prosecution, but not one of them was examined by the Munsif in presence of the accused persons. Only one Baldeo Sarup was examined when Babu Prasad was examined on 18th June. In my opinion the commitment is bad, inasmuch as no proper inquiry was held by the Munsif under S. 478, Criminal P. C. Cl. (2), of this section lays down that the "proceedings in such inquiry shall be conducted as nearly as may be in accordance with the provisions of Ch. 18."

By this I understand that the Munsif should have proceeded in the same way as a Magistrate would have done in inquiring into a case before commitment, i. e., he should have taken the evidence of the witnesses for the prosecution in presence of the accused persons and then examined the accused and having done this he should have framed the charge sheet and after explaining the same to the accused persons, should have recorded the order of commitment. I am therefore of opinion that the commitment is bad in law and should be quashed. I therefore order the record to be submitted to the Honourable High Court with the recommendation that the commitment be quashed and the case be sent back for the necessary inquiry to the Munsif or to the District Magistrate preferably to the latter.

Judgment.—The facts of this case are set forth in the referring order of the learned Sessions Judge and it is unnecessary to repeat them. It is clear that the procedure adopted by the Munsif in com-

mitting the case to the Court of Session was irregular and illegal. I agree with the view of the learned Sessions Judge and quash the commitment. I direct that the record be sent to the District Magistrate with the request that he himself or by a competent subordinate Magistrate do hold an inquiry into the matter and commit the case to the Court of Session, if necessary. The case should be deemed to have been committed to the criminal Court under S. 476, Criminal P. C.

V.B./R.K.

Order accordingly.

A. I. R. 1918 Allahabad 417

KNOX, AG. C. J.

Azizur Rahaman—Applicant.

v.

Hansa—Opposite Party.

Criminal Revn. No. 379 of 1918, Decided on 27th June 1918, from order of Dist. Magistrate, Agra, D/- 27th February 1918.

(a) Workman's Breach of Contract Act (1859), Ss. 1, 2—Application under Ss. 1 and 2 should not be summarily disposed.

An application to a Magistrate asking him to enforce the provisions of Ss. 1 and 2, Act 13 of 1859, should not be summarily disposed but the matter should be enquired into and evidence fully taken. [P 418 C 1]

(b) Precedent—Subordinate Courts must follow rulings of their High Court.

A Magistrate should not follow a ruling of a High Court to which he is not subordinate, when he has a ruling of the High Court to which he is subordinate before him. [P 417 C 2]

Narain Prasad Asthana—for Applicant.

Judgment.—This is an application for revision of an order passed by the Magistrate of Agra, whereby an order of a First Class Magistrate of Agra was confirmed. The First Class Magistrate of Agra had before him an application asking him to enforce the provisions of Ss. 1 and 2, Act 13 of 1859. All that appears before me on the record is an order in which the learned Magistrate arrives at the conclusion that the suit does not lie under Act 13 of 1859. No evidence appears to have been taken and all that is on the record is the contract. Act 13 of 1859 is an Act which has been extended to the station of Agra. The contract is upon a stamp paper and it recites that it is a contract under Act 13 of 1859. The First Class Magistrate sets out what he believes to be the obvious object of Act 13 of 1859. He says that

"it was designed to prevent coolies or labour contractors fraudulently bolting with the ad-

vances necessary for obtaining work from them and it was not designed to secure the employers enforcement of elaborate contracts with skilled artisans."

I do not know from what source the learned Joint Magistrate obtains this. There is nothing in the Act to this effect. The learned Joint Magistrate will do well to consider the ruling by which he is bound, namely, *Queen Empress v. Indarjit* (1). Having placed this interpretation upon the object of the Act, the learned Joint Magistrate went on to pass an order for which there is no warrant that I know of. That order runs as follows:

"The accused till to-morrow should produce balance of money due to the complainant. If he does so and the complainant takes it, accused will be acquitted. If he does so and complainant refuses the money, the case will be dismissed. If he does not produce it, it will be a clear case of bad faith and I shall proceed against him under Act 13 of 1859."

The morrow came and the accused produced the money required of him. The complainant refused to take it, saying that he wished to have the work done by the accused. The learned Joint Magistrate professed to act upon a ruling of the Bombay High Court *Queen Empress v. Rajab* (2) to which he is not subordinate and which he should not follow when he has before him rulings of this Court. I cannot moreover sanction the unwarrantable language used by the Joint Magistrate regarding an Act in the Statute book. He says:

"It is altogether preposterous that this Act, designed to protect people who make cash advances in order to import or secure manual labour from people not worth powder and shot in the civil Court, should be prostituted in this way by employers of skilled artisans."

The learned Joint Magistrate had no right to use language of this kind regarding a Statute which is in force and which he is bound to respect. The Act is in full force in the station of Cawnpur for instance, and for ought I know may be in full force in the station of Agra. I call the attention of the Courts below to the case of *C. J. Lucas v. Ramai Singh* (3) and *Bakhtawar v. Emperor* (4), both to be found in 16 A. L. J. R. 164. The learned Joint Magistrate says that he cannot compel Hansa to continue the work which he contracted to perform because it re-

1. (1889) 11 All 262.

2. (1892) 16 Bom 368.

3. A I R 1914 All 103=28 I O 195=15 Cr L J 289.

4. A I R 1918 All 211=40 All 282=19 I O 882=19 Cr L J 240.

quires him to sit very near the fire. He is said to have been working in the same situation in another factory. This may or may not be true. But the matter should have been enquired into and evidence fully taken. This was not a case for summary disposal. I set aside the orders of both the Courts below and I return the case in order that it may be dealt with strictly in accordance with the provisions of Act 13 of 1859.

V.B./R.K.

*Case remanded.***A. I. R. 1918 Allahabad 418**

RICHARDS, C. J. AND BANERJI, J.
Jhunku Lal—Defendant—Applicant.

v.

Bisheshar Das and another—Plaintiffs
—Opposite Parties.

Civil Revn. No 217 of 1917, Decided on 6th May 1918, from order of Munsif, Hathras.

(a) Civil P. C. (1908), O. 23, R. 1—Leave to withdraw when should be granted explained—Mere award of costs is not sufficient compensation—Trial Court has to determine whether "sufficient ground" for passing order exists.

A Court ought to be very slow to give liberty to bring a fresh suit after a case has been heard out on the merits, and an appellate Court ought seldom or never to do so, except where an application has been made to the first Court, and the appellate Court thinks the first Court should have granted the application. It was never intended that a plaintiff should have the power of trying out his case and then at the last moment asking for leave to withdraw with permission to bring a fresh suit. The mere ordering of the plaintiff to pay the defendant's costs does not compensate the latter for being sued a second time. [P 418 C 2]

It is for the trial Court to say whether or not there are "other sufficient grounds," in a case, within the meaning of O. 23, R. 1, for allowing the plaintiff to withdraw his suit.

[P 419 C 1]

(b) Civil P. C. (1908), O. 23, R. 1—Trial Court making mistake of jurisdiction—High Court is not entitled to interfere.

Where a trial Court has jurisdiction to allow a suit to be withdrawn with leave to bring a fresh suit, but it makes a mistake of law in exercise of that jurisdiction, the High Court is not entitled to interfere with the order of the trial Court in revision under S. 115. [P 419 C 1]

Panna Lal—for Applicant.

Durga Charan Banerji—for Opposite Parties.

Richards, C. J.—This is an application in revision and arises under the following circumstances. The plaintiff instituted a suit in the Court of the Munsif. After the evidence had concluded and either during or after the arguments, the plaintiff applied for leave to withdraw with

liberty to bring a fresh suit. He based his application upon the fact that he had failed to give formal proof of a certain plaint which was apparently considered by the parties to be essential to the plaintiff's success. The Court granted leave to bring a fresh suit. The present application is made under S. 115, Civil P. C. That section provides that

"the High Court may call for the record of any case which has been decided by any Court subordinate to such High Court and in which no appeal lies therto, and if such subordinate Court appears: (a) to have exercised a jurisdiction not vested in it by law, or (b) to have failed to exercise a jurisdiction so vested, or (c) to have acted in the exercise of its jurisdiction illegally or with material irregularity, the High Court may make such order in the case as it thinks fit."

It is argued on behalf of the applicant that the Munsif acted illegally or with material irregularity in granting permission to bring a fresh suit. O. 23, R. 1, deals with the withdrawal and adjustment of suits. R. 1 is as follows:

"At any time after the institution of a suit the plaintiff may as against all or any of the defendants, withdraw his suit or abandon part of his claim, where the Court is satisfied (a) that a suit must fail by reason of some formal defect, or (b) that there are other sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or part of a claim it may... grant the plaintiff permission to withdraw... with liberty to institute a fresh suit."

In support of the application the case of *Bai Kashibai v. Shidappa Anapa* (1), the case of *Khub Chand v. Ajodhia Prashad* (2) and the decision of their Lordships of the Privy Council in the case of *Robert Waston & Co. v. Collector of Zillah Rajshaye* (3) have been cited. I may say, speaking for myself, that I consider that a Court ought to be very slow to give liberty to bring a fresh suit after a case has been heard out on the merits, and probably an appellate Court ought seldom or never to do so except where an application has been made to the first Court, and the appellate Court thinks the first Court should have granted the application. I do not think that it ever was intended that a plaintiff should have the power of trying out his case and then at the last moment asking for leave to withdraw with permission to bring a fresh suit. The mere ordering of the plaintiff to pay the defendant's costs does not compensate the latter for being sued a second time. But the real question before

1. (1913) 37 Bom 682=21 I C 23.

2. (1913) 21 I C 76.

3. (1869) 12 W R 43=13 M I A 160 (P C).

us is whether or not we can interfere in revision upon the ground that the Munsif either had no jurisdiction, or that he exercised his jurisdiction with material irregularity. It will be noted that the rule is divided into two parts, first, where a suit fails for a "formal defect," and secondly, where there are "other sufficient grounds." It was for the Munsif to say whether or not there were "other sufficient grounds" in the present case. It is somewhat difficult to definitely decide that the absence of a witness could under no possible circumstance be "other sufficient grounds" within the meaning of rule. However this may be, it seems to me that even if the Munsif be taken to have made a mistake in law, we nevertheless are not entitled to interfere in revision. In the very recent case of *Balakrishna Udayar v. Vasudeva Aiyar* (4) their Lordships dealing with S. 115 of the present Civil P. C., say as follows:

"It will be observed that the section applies to jurisdiction alone, the irregular exercise, or non-exercise of it, or the illegal assumption of it. The section is not directed against conclusions of law or fact in which the question of jurisdiction is not involved."

In the Privy Council case referred to on behalf of the applicant the original Court had dismissed the plaintiffs' suit, at the same time recording in its "proceeding" that the order was not intended to bar the plaintiffs from proceeding as if the action had not been brought. The question which their Lordships had to decide was whether the appearance of these words in the "proceeding" enabled the plaintiff to bring a fresh suit, notwithstanding the dismissal of the first one, the defendant having pleaded *res judicata*. Their Lordships incidentally, it is true, dealt with the meaning of the expression "sufficient cause" appearing in S. 97, Act 8 of 1859, and no doubt took the view that that section was not intended to allow or enable a plaintiff to bring a fresh suit after it had been heard on the merits. I would reject the application.

Banerji, J.—I also am of opinion that the application should be rejected, but I would confine myself to this ground in rejecting it that it is not maintainable under S. 115, Civil P. C. It cannot be said that the Court below exercised a jurisdiction which was not vested in it by law. In the exer-

cise of the jurisdiction which it undoubtedly had it may have committed an error and apparently it did commit an error in the present case; but that alone would not justify this Court in interfering under S. 115 as interpreted by their Lordships of the Privy Council in previous cases, and also in the recent case to which the learned Chief Justice has referred. This being so, the application for revision cannot in my opinion be entertained and must be rejected.

By the Court.—The order of the Court is that the application is rejected with costs.

V.B /R.K.

Application rejected.

A. I. R. 1918 Allahabad 419

RICHARDS, C. J. AND BANERJI, J.

Mathura Prasad and another — Judgment-debtors—Appellants.

v.

Sheobalak — Decree-holder — Respondent.

Second Appeal No. 1086 of 1916, Decided on 12th November 1917, from decree of Dist. Judge, Benares, D/- 12th January 1916.

(a) Co-operative Societies Act (1912), S. 42 (5) (a) — Jurisdiction of civil Court—Liquidator passing order under S. 42—Civil Court must enforce order—Order of civil Court is not appealable.

Where a liquidator passes an order under S. 42, Co-operative Societies Act, 1912, a civil Court, mentioned in Sub-S. (5), Cl. (a), of the section, has no option but to enforce the order and no appeal lies from the order of the civil Court, inasmuch as no appeal lies save appeals expressly given by the Act. [P 420 C 1]

(b) Co-operative Societies Act (1912), S. 42 (a) — Jurisdiction of liquidator — Liquidator cannot pass order making debtors jointly and severally liable but determine contribution by debtor to money required for discharge of debts.

Semble.—In a case of a liquidation of a Co-operative Society a liquidator has no power to pass an order that each of the debtors should be jointly and severally liable for the amount of each other's mortgage, but if he requires money for the purposes of liquidation for the discharge of the debts of the Society he should determine the contributions to be made by the debtors. [P 420 C 12,]

Pyare Lal Banerji—for Appellants.

Tej Bahadur Sapru—for Respondent.

Judgment.—This appeal arises under the following circumstances. There was a Society registered under the Co-operative Societies Act, 2 of 1912. The Society got into debt. Its registration was cancelled and a liquidator appointed. There were a number of persons who were

members of the Society and had received advances. The liquidator took mortgages from each of the debtors for the amount of their liability. He then proceeded to make an order, which purported to be made under S. 42 (b), determining that each of the debtors should be jointly and severally liable for the full amount of the several debts. This order was sought to be enforced in the civil Court having local jurisdiction under the provisions of S. 42 (5) (a). The Court ordered execution. On appeal to the District Judge the appeal was dismissed. A second appeal has now been preferred to this Court. It is strongly contended on behalf of the appellants that the order of the liquidator was bad. It is said that while the liquidator had a perfect right to determine the "contributions" to be made by the members of the Society, he could not make them jointly and severally liable for each other's debts more particularly where, as in the present case, he had taken a mortgage from each of the debtors for the amount of his debt. On the other side it is objected that the Subordinate Judge was bound to execute the order of the liquidator and that he could not consider whether that order was right or wrong, that no appeal lay to the District Judge and that no second appeal lies to this Court.

We think all these objections have force. If the order of the liquidator can possibly be said to be an order under S. 42, then the Subordinate Judge, being the civil Court mentioned in sub-S. (5), Cl. (a), had no option but to enforce the order. It seems to us clear that no appeals lies save appeals expressly given by the Act and that no second appeal lies to this Court. It is quite clear that the policy of the Act was that matters arising under the Act should be settled without litigation in the Courts. If litigation were permitted, the whole object of the Co-operative Societies Act would be defeated. We think that in the present case we may depart from our usual practice of not saying anything which is not absolutely necessary for the decision of the case, because we are all interested in the good working of the Co-operative Societies Act. It seems to us that probably the liquidator was wrong in passing an order that each of these debtors should be jointly and severally liable for the amount of each other's

mortgage. If he required money for the purposes of liquidation and for the discharge of the debts of the Society, he had clear power to determine the contributions to be made, and we think that it would have been more correct had he made his order in this form and then proceeded to take steps to recover from each mortgagor the amount of his mortgage. We dismiss the appeal. The liquidator will get his costs in this appeal as part of his costs in the liquidation. The appellants will pay their own costs.

V.B./R.K.

Appeal dismissed.

A. I. R. 1918 Allahabad 420

TUDBALL AND ABDUL RAOOF, JJ.

Emperor

v.

Gulab and others—Opposite Parties.

Criminal Revn. No. 282 of 1918, Decided on 4th July 1918, from order of First Addl. Sess. Judge, Aligarh, D/- 9th February 1918.

Penal Code (1860), S. 300, Excep. 4 and S. 304—Lathis being lethal weapons, accused using them must be held to have knowledge that they were likely to cause death—Offence held to fall under Excep. 4 to S. 300.

A dispute arose over the payment of the rent of a certain field between the three accused and the deceased. The former attacked the deceased and his nephew with lathis and a regular fight took place between the parties. The result was that considerable injuries were caused on both sides and that the deceased was killed:

Held: (1) that lathis being lethal weapons, the accused must have known that they were likely to cause death. [P 421 C 2]

(2) That the case fell under Excep. 4 to S. 300 and that all the accused were guilty of an offence under S. 304. [P 421 C 2]

R. Malcomson—for the Crown.

Judgment.—Notice was issued by a learned Judge of this Court to the three persons Gulab, Majid and Ghafoor to show cause why they should not be convicted of an offence punishable under S. 304, I. P. C., why the sentences passed on them should not be enhanced, or why they should not be ordered to be re-tried on a charge under S. 302, I. P. C. The facts of the case as found by the Court below and which appear to us to have been correctly found are as follows: There was a sugarcane crop standing in three fields. It had been sown by the deceased Hardial and his partners Jahan-gir, Bhagwan Sahai and others. These fields had been given to Hardial by the

accused to enable him to recoup himself for certain moneys which he had advanced to them and which were due to him from them. The mortgage of an occupancy holding is of course contrary to law. No bond was executed in this case but the fields were actually made over to Hardial and he cultivated them. One of his duties was to pay the rent. The evidence shows that he had failed to pay two instalments. On the date in question he and his friends and his nephew Ganga Prasad were cutting the sugarcane crop when the three accused appeared upon the scene and Gulab objected to his cutting the crop as he had not paid the rent. Hardial replied that he had intentionally not paid the rent because the accused owed him other money and that he had set it off against the debt. Abuse followed between the parties and thereupon, according to the evidence for the prosecution, the three men attacked Hardial with their lathis. Ganga Prasad was also armed with a lathi and a regular fight took place between two men on one side and three on the other.

The result was considerable injuries on both sides. Hardial received three blows on the head, one on the cheek, one across the ear and some on his body. The injuries on the head were all on the right side. According to the evidence for the prosecution some of the injuries were inflicted after he had been knocked down and the fact that the injuries on the face, ear and head are all on the right side, is some indication of the fact that this really occurred. Ganga Prasad also received considerable injuries. Upon other persons arriving at the scene, the accused fled. The Court below has convicted the accused under S. 325, I. P. C., of having voluntarily caused grievous hurt, relying upon the ruling in the case of *Chandan Singh v. Emperor* (1). It is obvious that the offence of culpable homicide either amounting to murder or not amounting to murder was committed. A man's life had been taken. It is obviously impossible in cases of this description to be able to prove that the fracture of the skull which resulted in death was caused by a blow from the lathi of any special one of the assailants. In the present instance Hardial had three fractures of the skull and had received three lathi blows

upon the head. The three accused were all armed with the same class of weapon. They all attacked Hardial. A lathi is a lethal weapon, as has been repeatedly held in this Court for very many years.

The person who uses a lathi must know, on an occasion like this, that he is very likely to cause death. The three accused were moved by a common intention. That intention may not have been to cause death, but in carrying out their intention they all used deadly weapons and they must be deemed to have known that they were likely to cause death. We cannot agree that the accused can only be convicted of voluntarily causing grievous hurt. It is impossible to say whose lathi fractured the skull. The other blows inflicted on the body of Hardial caused only simple hurt. It appears to us that the present case falls within Excep. 4, S. 300, I. P. C., wherein it is stated

"that culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offenders having taken undue advantage or acted in a cruel or unusual manner."

If five or more persons had banded together in this matter on behalf of the accused, no one would have hesitated to have held all five guilty of the offence of culpable homicide not amounting to murder (S. 149, I. P. C.). Why because the number is reduced to three, these three should not be equally guilty under S. 304, I. P. C., we fail to understand. If one man alone had committed the offence he also would have been convicted under S. 304 of the Code. It is illogical to say because two others joined with him with similar weapons, that therefore the offence committed by the three is reduced to the lesser offence of voluntarily causing grievous hurt. With all due respect to the learned Judge who decided it we find it impossible to agree with the opinion expressed in the case of *Chandan Singh v. Emperor* (1). If the facts were as they are reported, then the offence in our opinion, was not even one under S. 304, I. P. C. It was a cruel and a brutal assault premeditated and committed for the purpose of revenge upon an unfortunate man. The offence committed appears to us nothing more or less than murder and all three accused were equally guilty as they were clearly moved by the same intent and had the same object and all three used lethal weapons. We do not agree

1. A I R 1918 All 209=40 All 103=43 I C 438
=19 Cr L J 150.

with the view of the law taken in that case and in that respect we would point out that it was quite inconsistent with the remarks to be found in the case of *Hanuman v. Emperor* (2). The remarks at p. 563 (of 35 *All.*) are worthy of note. They run as follows:

"It is impossible to prove by direct evidence the intention of a particular individual. The intention can only be inferred from the reasonable and probable result of his act or conduct. The learned Judge seems to confuse the meaning of the term intention with desire. It is quite possible that these persons had no wish either collectively or individually to kill Sheoratan (as is indicated by the fact that no wound was discovered on his head) but nevertheless if they beat him in the way it is proved that they did, they must be taken to have had knowledge that their act must in all probability cause death or such bodily injury as was likely to cause death, and if so, they are guilty of murder. Under circumstances such as these it is quite immaterial to ascertain whose blow was the immediately fatal one."

The learned Judges who decided that case distinctly dissented from the rule of law laid down in the case of *Dhian Singh v. Emperor* (3), which was a judgment of a Single Judge of this Court. They distinctly say:

"We cannot agree with the rule of law laid down in *Dhian Singh v. Emperor* (3)."

We should also call attention to the decision of this Court in the case of *Emperor v. Ram Newaz* (4). This was similarly a case of three men who with the same intent and object attacked another. They were armed with lathis. They inflicted serious injuries which resulted in death. All three of them were found guilty of the offence of murder. These cases no doubt are distinguishable from the cases before us for here the matter was a sudden one, it sprang up suddenly and the injuries were inflicted in the heat of passion. We think that the case falls within Excep, 4, S. 300, I. P. C. We therefore alter the conviction in the present case from one under S. 325, I. P. C., to one under S. 304, I. P. C., and in view of the circumstances of the case, we do not think it necessary to enhance the sentences that have been passed.

V.B./R.K. Conviction altered.

2. (1913) 35 All 560=21 I C 1005=14 Cr L J 685.

3. (1912) 13 Cr L J 265 = 14 I C 649.

4. (1913) 35 All 506=21 I C 663=14 Cr L J 615.

A. I. R. 1918 Allahabad 422

RYVES, J.

Behari Lal — Judgment-debtor—Applicant.

v.

Baldeo Narain and others — Decree-holders—Opposite Parties.

Civil Revn. No. 56 of 1918, Decided on 29th June 1918, against order of Dist. Judge, Allahabad.

Civil P. C. (1908), O. 3, R. 4, O. 21, R. 89 and O. 32, R. 5—High Court can revise conclusions of fact or of law bearing on questions of jurisdiction—Application to set aside sale filed by pleader appointed by guardian ad-litem of minor — Vakalatnama failing to state that guardian was executing it as such — Application rejected — Revision is competent.

Under S. 115, High Court is competent to revise a conclusion of law or of fact which bears on a question of jurisdiction. In execution of a simple money decree passed against a minor, a house belonging to the minor was attached and advertised for sale. An application asking for an adjournment of the sale was put in by a vakil appointed by the guardian of the minor, but the vakalatnama did not state that the guardian was executing it as such. An affidavit was filed by the guardian along with the application. The Court adjourned the sale and on the adjourned date the property was sold to a stranger. Thereupon the same vakil purporting to act on behalf of the minor filed an application under O. 21, R. 89, to set aside the sale. The Court rejected the application on the ground that it was not filed by the guardian or by a properly appointed vakil:

Held: (1) that the application was in order inasmuch as it had been filed by a vakil appointed by the guardian of the minor; (2) that the refusal of the Court to entertain the application amounted to a refusal to exercise a jurisdiction vested in it and that therefore the High Court was entitled to interfere in revision under S. 115. [P 425 C 1]

Motilal Nehru and Radha Kant Malaviya—for Applicant.

W. Wallach, S. M. Sulaiman, Ibr Ahmad, Tej Bhdadur Sapru and Sital Prasad Ghosh—for Opposite Parties.

Judgment. — The facts out of which this application arises are admitted. A suit was filed against a minor, Behari Lal, under the guardianship of his brother, Gaya Prasad, and a simple money decree was passed against him for a sum of Rs. 238-15-0. In execution of that decree, house property belonging to the minor was attached and advertised for sale. The sale was fixed for 14th April 1917. On 18th April 1917, an application was made by Gaya Prasad, as guardian of the minor asking for the adjournment of the sale. The application was put in by a vakil of the Court under a

vakalatnama executed by Gaya Prasad. In the body of the vakalatnama which is a printed document, and which is usually filed in by the vakil himself or his clerk, the name of Gaya Prasad was not entered. The document reads "I . . . appoint" so and so. It was executed by Gaya Prasad. Of this there is no question, but he did not add that he was executing it as the guardian of the minor. Along with this application there was filed an affidavit by Gaya Prasad. Taking the two together it was quite obvious that the application for adjournment was being made by him as guardian of the minor through the vakil whom he had appointed to act for him. The Court accepted the application to this extent that it granted an adjournment of the sale for six days and 20th April 1917 was fixed. On that date the sale was held and the property was knocked down to an outsider, i. e., to a person who was no party to the suit, for a sum of Rs. 180, the opposite party here. It is admitted that the property was worth a very great deal more than what it was knocked down for. On 4th May 1917, an application was made under O. 21, R. 89, by the same vakil. It purported to be tendered on behalf of the minor. The proper amount had been paid into Court within the time allowed and the application must have been accepted by the Court and the sale set aside unless the application was not in order. The Court of first instance rejected the application in these terms :

"This application under R. 89, O. 21, Civil P. C., has been presented by the applicant who is minor and it is not presented by a next friend. The minor's application was filed through a pleader who does not appear to have been retained by him, vide the vakalatnama. The application is against the provisions of R 5 (1), O. 82, Civil P. C., and is also vague. No order can legally be passed on it without the minor being represented by a next friend. I therefore reject this application with costs."

That is the order really in question here. The lower Court found, and rightly found, that the application in itself was not vague and that it entirely complied with O. 21, R. 89, but it held substantially for the same reason as the first Court that the application had not been properly presented on behalf of the minor, and rejected the application. From this order no appeal lies to this Court ; hence an application in revision. Two arguments are raised against my

interfering. First of all it is said, on the authority of *Balakrishna Udayar v. Vasudeva Aiyar* (1), and three recent rulings of this Court, reported as *Fajal Rab v. Manzur Ahmad* (2), *Jhunku Lal v. Bisheshar Das* (3) and *Jwala Prasad v. E. I. Ry. Co.* (4), that this Court has no power to interfere. It is said that the lower Court had jurisdiction to go wrong and assuming it did go wrong, that decision is final. Secondly, it is argued on the merits that the decision on the point of law is correct. It seems to me that, put in plain language, the Court declined to hear the applicant. It declined to hear the minor himself because of his minority, and declined to hear the pleader because of a supposed defect in his vakalatnama. It seems to me that if the Court was wrong in its reasons for not hearing the pleader and therefore not accepting the application, it declined to exercise a jurisdiction vested in it, or at least acted with material irregularity in the exercise of its jurisdiction. There is one passage in the judgment of the Privy Council report *Balakrishna Udayar v. Vasudeva Aiyar* (1) which, read by itself, and separated from the context and read without consideration of the facts of that case, does support the objection of the opposite party. It is the sentence which is reported at p. 799 (of 40 Mad.) and runs as follows :

"It will be observed that the Section (115) applies to jurisdiction alone, the irregular exercise or non-exercise of it or the illegal assumption of it."

But the judgment does not end there, it goes on to say :

"The section is not directed against conclusions of law or fact in which the question of jurisdiction is not involved, and if the applicant's contention be correct, then, if the civil Court should absolutely and whimsically decline to exercise its jurisdiction and refuse to make any orders as to the filling up of vacancies, no matter how many existed, there would not, in a case such as the present, be any remedy available under this section and no appeal would lie."

In that case the District Judge, purporting to act under a particular section of a particular Act, construing the section as he did, held that he had jurisdiction to pass a particular order, and passed it. Objection was taken to this order before the successor of the District Judge on the ground that the former Dis-

1. A I R 1917 FC 71=40 Mad 793=40 I C 650

2. A I R 1918 All 192=40 All 425=45 I C 773

3. A I R 1918 All 418=46 I C 71.

4. A I R 1918 All 415=46 I C 99.

strict Judge had no jurisdiction to pass it. The Court held that he had. An application was then made to the High Court of Madras in revision, and it was argued that the High Court has no power to interfere, one argument being that the decision of the Court below was at the most a wrong decision on a point of law. The High Court repelled this objection and did interfere in revision, and the Privy Council upheld its decision. It seems to me what the Privy Council case decided was that the Section (115, Civil P. C.), is not directed against conclusions of law or fact *in which the question of jurisdiction is not involved*. (I think the words which I have italicized are most important). It seems to me to follow from this that where a question of jurisdiction is involved, this Court is competent to revise a conclusion of law or fact which bears on a question of jurisdiction. In the case before me it seems to me that on the point of law decided, a question of jurisdiction is involved therefore I think I have jurisdiction to consider that point on the merits.

Three recent cases of this Court however are quoted in support of the objection. The first case is that of *Fazal Rab v. Manzur Ahmad* (2). On the face of it, that case looks very like the present case, but there the only point decided was that payment of money into the treasury was not a payment into Court within the meaning of R. 89, O. 21, and this Court held that, if that decision was a wrong one, it could not be set aside in revision. There no question of jurisdiction was involved. In the next case, at p. 499 (of 16 A. L. J.) of the same volume, also no question of jurisdiction was involved. In the last case, to which I was a party, a question of jurisdiction was involved. The case was decided only a very short time ago and I remember perfectly well that we did go into the merits and were satisfied that the order of the Court below, in returning the plaint, was a proper order and one which the Courts had jurisdiction to pass and should have passed. That case therefore in my opinion is not a helping guide. In that case no authorities were cited. I must confess that I had not then studied the Privy Council case in *Balakrishna Udayar v. Vasudeva Aiyar* (1) as carefully as I have since done, and I am inclined to think that perhaps the judgment was expressed

unnecessarily broadly. It seems to me on full consideration that the Privy Council case gives me jurisdiction to go into the merits of the decision in this case on the point of law involved.

There is one other aspect of the case which I think should not be lost sight of. The defects, if any, in the application or the power of attorney were purely technical, and seeing that the property of a minor was at stake, I think that if the Court had doubts, it would have been well advised to have called evidence and ascertained whether the guardian had in fact authorized the vakil to make the application. I do not however base my judgment on this consideration, though in my opinion it has weight. On the merits—the application of 4th May 1917, purported, as I have said, to be made by the vakil on behalf of the minor. There was no fresh vakalatnama, it is admitted, executed by the guardian of the minor authorizing the vakil specifically to file this application. It seems to me that no new vakalatnama was required for this particular application. The vakil had been appointed by Gaya Prasad to appear for the minor in a former stage of the litigation and also to put in the application of 13th April asking for an adjournment of the sale in these very execution proceedings. If that appointment was a good appointment, then it seems to me that it was still in force under O. 3, R. 4, Civil P. C. But it is argued that the vakalatnama executed by Gaya Prasad was not valid for two reasons. One that the clerk of the vakil or somebody should have recorded in the body of the application, for a second time, the statement that it was Gaya Prasad who was making the appointment, and as guardian of the minor.

As the vakalatnama runs, Gaya Prasad and no one else was making the appointment. It says so. "I appoint" and although that vakalatnama was executed by Gaya Prasad, it is said to be invalid as there was no statement in it to the effect that Gaya Prasad executed it as "guardian of the minor" or some such words. This seems to me a very technical objection. Except as guardian of the minor he had nothing whatever to do with the suit or the proceedings in execution. I have already said, he himself came into Court and made the application for the stay of the sale on 13th

April, and put in an affidavit. The application showed that he had appointed the vakil to act for the minor of whom he, Gaya Prasad, was the guardian. It seems to me therefore that the application of 4th May was in order, and that the Court has failed to exercise its jurisdiction in not accepting it because it came to a wrong decision on a point of law. Undoubtedly if it had decided as, I think, it should have decided, it should have accepted the application. I therefore setting aside the order of the Court below, pass the order which, I think, it should have passed, i. e., I direct that the money paid into Court be made over to the purchaser and the sale be set aside. The applicant will have his costs throughout.

V.B./R.K. *Application allowed.*

A. I. R. 1918 Allahabad 425

PIGGOTT AND WALSH, JJ.

Afzal Shah and another—Plaintiffs—Appellants.

v.

Lachmi Narain and others—Defendants—Respondents.

Second Appeal, No. 373 of 1916, Decided on 23rd June 1917 from the decision of First Addl. Judge, Aligarh, dated 4th December 1915.

(a) Civil P. C. (1908), O. 1, R. 3 and O. 23, R. 1—Multifariousness—What is explained—Defect of multifariousness is technical and suit can be allowed to be withdrawn.

Plaintiffs who were auction-purchasers of certain property, brought a suit for a declaration of title, recovery of possession and mesne profits, impleading three sets of defendants on the allegation that owing to the fraud of the judgment-debtor the property was put up to sale a second time and was purchased in different lots by the defendants:

Held, (1) that the suit was bad for multifariousness: [P 426 C 2]

(2) that the plaintiffs should be allowed to withdraw the suit with leave to bring fresh suits, inasmuch as the error made by them in filing one single suit when they ought to have brought three or more was a defect of a formal nature having nothing to do with the merits of the plaintiffs' claim. [P 426 C 2]

(b) Civil P. C. (1908), O. 23, R. 1—Leave to withdraw can in suitable case be granted in second appeal.

In a suitable case the High Court can, even in second appeal, take action under O. 23 R. 1 Civil P. C. [P 426 C 1, 2]

S. M. Sulaiman—for Appellants.

Tej Bahadur Sapru and Panna Lal—for Respondents.

Judgment.—This is a second appeal which comes before us under the follow-

ing circumstances. The plaintiffs alleged themselves to have acquired certain property at public auction. They alleged that, under circumstances perhaps amounting to fraud on the part of the judgment-debtor, the property was put up to sale a second time and was purchased in different lots by different persons. On this they impleaded three different sets of defendants claiming a declaration of their own title, recovery of possession, and mesne profits. Separate defences were filed by the members of the different sets of defendants, and in each of these defences the particular defendant concerned protested that he had nothing to do with the property specified in the plaint except only one single item of the same. Arising out of this plea of fact, the point was taken that the suit was bad for misjoinder of causes of action and that each defendant or set of defendants should have been separately sued for ejectment as a trespasser in respect only of such items of property as were in the possession of each defendant or defendants severally. A curious feature of the case was that, when the pleadings of the parties were complete it was apparent that a portion of the property specified in the plaint was not claimed by any of the defendants at all, that is to say, the plaintiffs were claiming to recover possession of some property from defendants who repudiated having anything to do with it. In the result the Court of first instance dismissed the suit, and this dismissal has been affirmed by the Additional District Judge in appeal.

The only point dealt with by the lower appellate Court was that the suit was bad for multifariousness. As a matter of fact there had been an order by the predecessor-in-office of the learned Judge who finally disposed of the appeal which was no doubt well intended, being an effort on the part of the Court to bring the actual question in dispute to a final adjudication, but the actual effect of that was to make the confusion worse. The learned Judge directed the plaintiffs to implead a number of fresh defendants, presumably on the ground that they were the persons in possession of those portions of the property in suit which were not claimed by any of the original defendants. This order was complied with in a curious fashion, by the addition of two new defendants in the specification of defendants in

the plaint, without the addition of any statement of any sort or kind in the body of the plaint to suggest what the cause of action against the defendants thus added was supposed to be. However the suit having been, as already stated dismissed by the lower appellate Court, the plaintiffs come to this Court in second appeal, and in their memorandum of appeal as drafted they simply call in question the finding of law on which their suit was dismissed by the Court below. The pleas in the memorandum of appeal are that the suit is not bad for multifariousness, that it was maintainable as framed and that the reliefs claimed therein could have been granted in one suit against all the defendants. It is unnecessary for us, as the case now stands, to go further into this matter beyond saying that we could not have acceded to this contention.

There was no allegation in the plaint of any joint action or community of interest as between the different sets of defendants. If the principle suggested by the memorandum of appeal before us were correct, it would follow that any owner of property might bring one single suit against an unlimited number of wholly unconnected trespassers on different portions of his property, merely on the ground that he himself owned the entire property under a single title. This is a proposition which could not be affirmed. It is idle for the appellants to refer us to those rules in the Civil Procedure Code which refer to the circumstances under which different defendants may be jointly impleaded on a single cause of action. The present is not a case of an alleged misjoinder of defendants on a single cause of action, but of alleged misjoinder of causes of action. In the course of arguments before us it was strongly represented to us on behalf of the plaintiffs appellants that their suit ought not to have been allowed to fail altogether upon such a merely technical ground. Various suggestions were put forward as to the manner in which the defect, if found to exist, might be remedied. Finally, we gave the plaintiffs time to consider their position, in order that they might, if they thought fit, apply to this Court for permission to withdraw from the suit under O. 23, R. 1, Civil P. C. An application to this effect has now been laid before us, and we have heard both parties concerning it. The jurisdiction of this Court to

take action under the rule above mentioned, even at the stage of second appeal, is not questioned, and such jurisdiction has from time to time been exercised in suitable cases. Neither can it be denied that the suit now before the Court is one which must fail by reason of a formal defect, namely, that of misjoinder of causes of action in a single suit, that is to say, the error made by the plaintiffs in filing one single suit when they ought to have brought three or more is clearly a defect of a formal nature having nothing to do with the merits or otherwise of the plaintiff's claim.

The only question therefore for us to consider is whether this is a proper case for the exercise of our discretion in favour of the plaintiffs. On a fair consideration of the matter it seems to us that, subject to full compensation being made to the defendants in the matter of costs for the expenses to which they have been subjected up to this stage in the litigation, the case is a suitable one for permitting the plaintiffs to abandon the untenable position which they took up when they filed this suit, leaving their rights otherwise unimpaired, so that they may seek redress from the law for any wrong which they may have suffered by the institution of such properly framed suit or suits as may be found to be necessary. First, we make the order which we propose to pass subject to this contention, that all costs incurred up to this date by any of the defendants-respondents in all three Courts, including in this Court fees on the higher scale, are hereby made payable by the plaintiffs-appellants. Subject to this condition, we set aside the decrees of both the Courts below and, in place thereof, pass an order permitting the plaintiffs to withdraw from the present suit with liberty to institute such fresh suit, or rather fresh suits, in respect of the subject-matter of the present suit as they may be legally advised.

V.B./R.K.

Suit withdrawn.

A. I. R. 1918 Allahabad 426

WALSH, J.

Manphool—Plaintiff—Appellant.

v.

Sahi Ram and others—Defendants—Respondents.

Second Appeal No. 534 of 1916, Decided on 25th June 1917, against decision of Sub-Judge, Muttra, D/- 4th January 1916.

Arbitration — Award — Failure to sign by arbitrator of one party, does not invalidate award.

Where an award is arrived at by the arbitrators of both parties and represents their decision the failure of the arbitrator of one party to sign it does not render it invalid. (P 427 C 1)

Baleshwari Prasad—for Appellant.

Judgment.—I must allow this appeal. As regards the question whether the order of the Munsif setting aside the award could be challenged in appeal before the District Judge, there is a decision binding upon me by two Judges of this Court in the case of *Ram Autar Tewari v. Deeki Tewari* (1) which apparently was not brought to the notice of the learned Judge of the Court below, as he held himself bound by *Ganga Prasad v. Kura* (2), which has since been differed from. The further question arises whether the Munsif's order can be supported. He appears to have set aside the award upon the ground that although there were two arbitrators the award was signed only by the plaintiff's arbitrator and the umpire and that therefore it was invalid. There is a decision reported as *Muthukutti Nayakan v. Acha Nayakan* (3), which although not binding upon me, I should in any case follow and hold that this is not a sufficient ground for setting aside an award. The Munsif before doing so should have gone into the merits and ascertained whether the award had been arrived at by the arbitrators and represented the decision. Apart from this if it were held that failure by the arbitrator of one party to sign an award rendered it invalid, it would always be possible for any party to render arbitration proceedings wholly infructuous by persuading his arbitrator not to sign the award. In the absence of authority to support the decision of the Court below, I have no option but to allow the appeal with costs here and in the lower Court and I direct a decree to be drawn up in favour of the plaintiff in accordance with the award.

V.B./R.K.

Appeal allowed.

1. A I R 1915 All 247=29 I O 411=37 All 456.

2. (1906) 28 All 408.

3. (1895) 18 Mad 22.

A. I. R. 1918 Allahabad 427

RICHARDS, C. J. AND BANERJI, J.

Jaimal Singh—Plaintiff—Appellant.

v.

Shib Saran Singh and another—Defendants—Respondents.

Second Appeal No. 1758 of 1916, Decided on 9th May 1918, from a decree of Dist-Judge, Bareilly.

Agra Tenancy Act (2 of 1901), S. 201—Suit for profits—Plaintiff not recorded cosharer—Still suit is maintainable—Procedure laid down.

The mere fact that the plaintiff in a suit for profits is not a recorded cosharer of the property in respect of which the profits claimed are alleged to have accrued due, is not sufficient to prevent him from maintaining the suit. S. 201 provides for what is to be done in the case of a plaintiff who is recorded and the case of a plaintiff who is not recorded. If the issue arises as to the latter's title, the Revenue Court is either to try the case itself or to refer the plaintiff to a civil Court. (P 427 C 2)

Sham Nath Mushran—for Appellant.

Nehal Chand—for Respondents.

Judgment.—We think that the ground upon which the lower appellate Court decided this case was not correct. The plaintiff is not a recorded cosharer of the property in respect of which the profits claimed are alleged to have accrued due. The lower appellate Court seems to think that the mere fact that the plaintiff was not recorded was sufficient to prevent him from maintaining the suit. We do not think this view is correct. S. 201, Tenancy Act, provides for what is to be done in the case of a plaintiff who is recorded and in the case of a plaintiff who is not recorded. If the issue arises as to the latter's title, the Revenue Court is either to try the case itself or to refer the plaintiff to a civil Court. We think however that it is perfectly useless to send the case back for trial, because on the allegations of the plaintiff himself in his plaint he cannot possibly maintain the present suit. According to his own allegations the defendant Mt. Dayali Kunwar is not and was not a cosharer. The other defendant is a minor and it is not alleged that he made collections. Furthermore the suit is a suit for profits. Otherwise it could not have been instituted in the Revenue Court. It is not alleged and could not have been alleged that either the minor or Mt. Dayali Kunwar was the lambar-dar. In reality the plaintiff's suit is a suit for damages because a certain compromise was not carried into effect. The compromise fell through because it was

found by the Court that the compromise was not for the benefit of the minor. The person with whom the compromise was really made was dead before the institution of the suit. We dismiss the appeal with costs.

V.B./R.K.

Appeal dismissed.

A. I. R. 1918 Allahabad 428

RICHARDS, C. J. AND TUDBALL, J.

Anchal—Plaintiff—Appellant.

v.

Dalip Singh and another—Defendants—Respondents.

Second Appeal No. 691 of 1917, Decided on 16th July 1918, from a decree of Dist. Judge, Saharanpur, D/- 17th April 1917.

Pre-emption—Acquiescence, what amounts to, illustrated—Plaintiff willing to sell his own share amounts to acquiescence.

In a suit brought by the plaintiff for pre-emption on the ground that he was a cosharer in the property sold and a brother of the vendor while the vendee was a cosharer only, it appeared that the plaintiff was heavily in debt at the time of the sale, that he had no money and that he was willing to sell his own share in the property to the vendee along with his brother.

Held: that this conduct of the plaintiff amounted to an acquiescence by him in the sale, and that his suit must therefore be dismissed.

[P 429 C 1]

Nehal Chand—for Appellant.

Surendra Nath Sen—for Respondents.

Judgment.—This appeal arises out of a suit for pre-emption. The plaintiff was a cosharer as also were the vendees, but the plaintiff was own brother of the vendor whilst the vendees were distant connections. The vendees pleaded various defences. They denied the custom. They denied the plaintiff's preferential right and alleged that the sale was made with the consent and knowledge of the plaintiff. The Court of first instance held that the custom of pre-emption prevailed and that the plaintiff had a preferential right, and it held against the defendants on the issue of the acquiescence. The lower appellate Court held that the entry in the *wajib-ularz* was insufficient to establish the existence of the custom and that the weight to be attached to the record was greatly diminished by the fact that a number of other matters were recorded, which could not possibly be customs, in the very same clause. The plaintiff has appealed. We may mention here that the lower appellate Court has not dealt with the issue of acquiescence on the part of the plaintiff. We think that this issue ought to have

been decided and inasmuch as the lower appellate Court has not decided the issue we are entitled to decide the issue ourselves.

We have already mentioned that the plaintiff is own brother to the vendor. *Prima facie* therefore, if the plaintiff had been ready and willing to keep the property, there would be no person to whom the vendor would be more likely to wish to sell the property than to his own brother. It is not pretended that there was any quarrel or dispute between the brothers. In the written statement it was expressly pleaded that the plaintiff had acquiesced in the sale, that he was a man who was heavily in debt, that his property was under mortgage, that he had previously sold a large portion of his property and that five days before the sale-deed was executed, he had sold another portion. The plaintiff when cross-examined, admitted that he was in debt. He admitted that he had sold a considerable portion of his property and that one sale had taken place almost simultaneously with the sale to the defendants, the vendees in the present suit. Evidence was produced on behalf of the vendees to the effect that the sale to the vendees had been negotiated by the two brothers and that the plaintiff at that very time wanted to sell his own property to the vendees, who explained that they had not sufficient money to buy the shares of both brothers. The witness who deposed to these facts was hardly (if at all) cross-examined in respect to these matters. Bearing in mind the initial probability of this evidence being true having regard to the close relationship that existed between the vendor and the plaintiff, namely, that they were own brothers, we think it extremely surprising that the learned Subordinate Judge who tried this case in the first instance absolutely discarded the evidence.

The learned Subordinate Judge says that if the plaintiff knew of the sale, the vendees would have required the plaintiff to be a witness to the sale-deed. The vendees no doubt might have done this had they anticipated roguery on the part of the plaintiff. But if, on the other hand, the evidence be true that the plaintiff was actually asking the vendees to purchase his own property at the very same time it is hardly surprising if the vendees never anticipated that after they had purchased the other brother's share a

suit of this nature would have been instituted. The learned Subordinate Judge says:

"It is further urged that the plaintiff is in debt and had not the means to purchase a share. I do not think this argument plausible. Plaintiff could advance Rs. 1,120, or had sufficient property by selling part of which he could raise Rs. 1,120."

Now in the present case it is admitted by the plaintiff himself that he was in debt that he had no money and that he was selling his own property, and yet the learned Subordinate Judge thinks that there was no force in the argument that he would in that condition be unwilling to purchase this property. The learned Judge says that the plaintiff could easily have raised the money by selling another portion of his property. This seems to be a very poor argument. It does not appear very reasonable that a man who has no ready money should sell a share which is already in his possession, for the privilege of buying another share which is not in his possession, having of course to meet some expense in connection with the transfer. Under the circumstances of the present case we have not the least hesitation in holding that the plaintiff knew and acquiesced in the sale to the vendees-defendants. We dismiss the appeal with costs.

V.B./R.K.

Appeal dismissed.

A. I. R. 1918 Allahabad 429 (1)

RICHARDS, C. J. AND TUDHALL, J.

Lalta Prasad Chaudhry—Plaintiff—Appellant.

v.

Gokul Prasad and others—Defendants—Respondents.

Second Appeal No. 6 of 1917, Decided on 7th May 1918, against a decree of Addl. Sub-Judge, Gorakhpur.

Pre-emption—Custom—Plaintiff within custom at time of sale by imperfect partition—Plaintiff is entitled to priority to pre-empt.

Where a custom of pre-emption is proved, if the plaintiff can show that he comes within the custom at the time of the sale he is entitled to the benefit of the custom. The mere fact that he was not within the custom prior to partition does not prevent him from subsequently acquiring the right. [P 429 C 2]

Where an entry in the *wajibulaz* of a village provided that a cosharer in the same subdivision as the vendor would have a preferential right of pre-emption over a cosharer in another subdivision and it was found that the plaintiff was a cosharer in the same patti with the vendor but that the patti was created by imperfect partition in recent years:

Held: that the plaintiff had a preferential right of pre-emption over cosharers in other patts. [P 429 C 2]

J. Simeon—for Appellant.

Gulzari Lal—for Respondents.

Judgment.—This appeal arises out of a suit for pre-emption. The plaintiff is a cosharer in the same patti with the vendor but the was patti created by imperfect partition and in more recent years. There seems to be no dispute that a custom of pre-emption prevails in the village. The entry in the *wajibularz* of 1860 gives the first right to *hissadar karibi* and both Courts were of opinion that this meant that the cosharer in the same subdivision as the vendor would have a preference over a cosharer in another subdivision. The Court of first instance decreed the plaintiff's claim. The lower appellate Court reversed the decision of the Court of first instance solely on the ground that the plaintiff's being in the same patti as the vendor was due to imperfect partition. It referred to a case reported as *Mahadeo Prashad Sahu v. Jaipal Raut* (1). We do not agree with the decision in this case. It seems to us that where a custom is proved, if the plaintiff can show that he comes within the custom at time of the sale he is entitled to the benefit of the custom. The mere fact that he was not within the custom prior to partition does not prevent him from subsequently acquiring the right. For example, it can hardly be said that if a cosharer acquired a share in a patti by sale, he would not have the right of a cosharer in that patti upon a sale subsequently made by one of the cosharers. The right which the plaintiff acquired by imperfect partition was just as binding upon the cosharers as if he had acquired the right by sale. We must allow the appeal, set aside that decree of the lower appellate Court and restore the decree of the Court of first instance with costs in all Courts.

V.B./R.K.

Appeal allowed.

1. (1910) 8 I C 267.

A. I. R. 1918 Allahabad 429 (2)

PIGGOTT, J.

Tapti Prasad—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 399 of 1917, Decided on 26th May 1917, from order of Sess. Judge, Allahabad.

Penal Code (45 of 1860), S. 304-A—Railways Act (9 of 1890), S. 101—Rash and negligent act causing death—Station Master giving "line clear" knowing another train standing in the way, is guilty under both the sections when death ensues.

An Assistant Station Master gave a "line clear" to an incoming passenger train on a foggy night with the knowledge that a goods train was standing at a particular point where the passenger train might collide with it, but hoping to remove the goods train to a siding before the arrival of the passenger train. The goods train was not removed in time and a collision occurred which was attended with loss of life:

Held: that the Assistant Station Master was guilty of a rash and negligent act in giving the "line clear" and was therefore punishable under S. 304-A, I. P. C., and S. 101, Railways Act.

[P 431 C 1]

Satya Chandra Mukerji—for Applicant.

R. Malcomson—for the Crown.

Judgment.—The applicant Tapti Prasad was Assistant Station Master at a Railway Station called Bharwari. While he was on duty a collision took place, within the limits of that station between a down passenger train and an up goods train. The latter train was standing within the station limits but beyond the starting signal at the moment when Tapti Prasad gave the "line clear" which permitted the passenger train to leave the next station on the line. The collision which followed was attended with loss of life, and the immediate cause of the collision was the action of Tapti Prasad in giving the "line clear" for the passenger train under the circumstances stated. In doing so he contravened the rules laid down for his observance, both general and special. The Magistrate who tried the case has written an admirable judgment in which he has set forth all the evidence and discussed it in an exceedingly fair and convincing manner. He found Tapti Prasad guilty and convicted him under S. 304-A, I. P. C., and S. 101, Railways Act 9 of 1890. The convictions were affirmed and the appeal of Tapti Prasad was dismissed by the learned Sessions Judge. I have had to consider in the main two points. The less important of the two is a plea as to the severity of the sentence. This rests mainly upon Tapti Prasad's assertion that in giving "line clear" at the moment when he did, and under the circumstances in which he did, he was acting under direct orders received from a superior officer named Dhani Ram, the "controller" at Allahabad. The Magistrate and the Sessions Judge have alike

pointed out that this plea would in no case amount to a complete defence to the charge. It has however an important bearing on the question of sentence, and in view of the manner in which the Courts below have expressed themselves on the point, I thought it incumbent upon me to examine the evidence and to decide whether there was any reasonable basis for the plea taken. I am quite satisfied that there was not, and that the Courts below were right in holding, as they did in substance, that Tapti Prasad gave the "line clear" on his own responsibility and without express orders from the controller.

The other point taken, and the one which goes to the root of the case, is that there was neither rashness nor negligence in the accused's action, so as to bring it within the purview of S. 304-A, I. P. C., and that there was no disobedience to any rule, nor any rash or negligent act on his part, to make the provisions of S. 101 Railways Act, applicable. I am satisfied that there was a distinct breach of the rules in giving the "line clear" while the goods train was standing at the particular point where to the accused's own knowledge it was standing. Putting that matter on one side, I am also satisfied that the giving of the "line clear" under the circumstances stated was a rash act. The plea to the contrary is based upon the fact that the approaching passenger train had to run past the distant signal of Bharwari Railway Station before it could collide with the goods train, and that the aforesaid signal was at "danger." The collision took place at night and it was a foggy night. I mention these circumstances rather as explaining how the collision occurred, and as bearing on the decree of culpability attaching to the accused's act than as material in themselves on the question of law involved. The possibility of an incoming train passing a danger signal either through some failure in the mechanism of the signal itself or through some error or oversight on the part of the driver, is a matter which is taken into consideration by the rules and the interposition of a danger signal cannot be permitted, with any reasonable regard for the safety of the travelling public, to relieve an officer in the position of a Station Master, or Assistant Station Master on duty, from the obligation of observing strictly the rules

laid down on the subject of granting or withholding the "line clear." Danger signal or no danger signal it was a rash act on the part of the accused to have granted the "line clear" under the circumstances stated. It is true that when he granted it he hoped that the goods train would be safely backed into a siding out of the way before the incoming passenger train reached the station limits and that within the time available this could have been done. To say this however is only equivalent to saying that the accused did not deliberately plot the bringing about of an accident involving imminent risk of life to his fellow creatures. In taking upon himself the responsibility of granting "line clear," when he knew that the line was not actually "clear" and taking it for granted that he would succeed in getting the line cleared within the time available he displayed precisely that quality of mind which is indicated by the word "rashness." I cannot see my way to interfere either with the conviction or the sentence. The application is dismissed.

V.B./R.K. *Application dismissed.*

A. I. R. 1918 Allahabad 431

PIGGOTT AND RYVES, JJ.

Bharat Das—Defendant—Appellant.

v.

Nandrani Kuar—Plaintiff—Respondent.

Second Appeal No. 1434 of 1915, Decided on 25th June 1917, against decision of Dist. Judge, Cawnpore, D/- 7th September 1915.

Agra Tenancy Act S. 158—Applicability—Rent free grant to mahant without dedication either of land or profit therefrom to deity—Land held by more than two successors of mahant—Provisions of section apply—Land must be deemed to be held in proprietary right by mahant.

Where a rent free grant was made to the mahant of a temple for the benefit of the temple but there was no dedication either of the land itself or of the income of the land to the deity worshipped in the temple, and the land was held by more than two successors of the mahant to whom the grant was first made:

Held: that the provisions of S. 158 of the Agra Tenancy Act applied to the case and that the land must be deemed to be held in proprietary right by the mahant of the temple. [P 492 C 1, 2]

P. L. Banerji—for Appellant.

Damodar Das—for Respondent.

Judgment.—In this suit the plaintiff came into Court, alleging that she was the lambardar and zamindar of a certain

mahal. The defendant, who was described as Bharat Das, disciple of Rikhi Das, muafidar of the said mauza and mahal, was alleged to be a muafidar of 62 bighas 12 biswas of the land in suit granted for charitable purposes. The suit was brought for resumption of this grant. In reply the defendant pleaded, first, that the land itself had been dedicated to the temple of Sri Radha Kishunji and was therefore wakf property appertaining to an endowment in favour of the said temple, of which the defendant was the manager. He repeated this plea in a slightly different form, alleging that the muafidar against whom the suit should have been brought was Sri Thakur Radha Kishunji, the idol worshipped in the temple above referred to. The next plea, in the alternative, raised by him was that, if he was in fact himself the muafidar as alleged in the plaint, then this land had been held rent-free for more than 50 years and by more than two successors to the original grantee, the grant having been made in the first instance in favour of Mahant Pirya Das from whom the defendant was the fifth mahant in succession. The case went to trial on these pleadings. The Assistant Collector found that the land in suit had in fact been granted for the benefit of the temple, more than 50 years prior to the institution of the suit and in the time of Mahant Pirya Das. It appears to be correct that the defendant is the fifth successor of Mahant Pirya Das in the line of mahants. The Assistant Collector however held that the grant having been for the benefit of the temple and not for the benefit of the mahant as such it could not be regarded as a grant in favour of the latter, but as a grant in favour of the temple so that there had been no succession and the provisions of S. 158, Tenancy Act, could not apply. The learned District Judge has affirmed this decision on appeal.

There seems to have been some question raised in argument before the District Judge as to whether the entire area in suit formed part of the original grant made in the time of Mahant Pirya Das. The District Judge expresses himself somewhat doubtfully on this point but the documentary evidence on the subject seems clear enough, and apparently the difficulty felt by the District Judge was due to his confining his attention to the

records of a single mahal. The plaintiff came into Court alleging that the defendant was a rent-free grantee of the entire area in suit, and there was no suggestion in the plaint that this area had been granted at two different times, nor does there seem room for any such supposition in the evidence on the record. The findings therefore we take to be these. The grant was made for the benefit of the temple; but there was no dedication either of the land itself or of the income from the land to the deity worshipped in the said temple, regarded as a juristic personality. The name of the idol has never appeared in the village papers as the grantee. The grant being for the benefit of the temple, must necessarily have been made to some manager or trustee, and it was made to the mahant of the institution now represented by the present defendant as such manager. It is certain that there have been more than two successors to the original mahant in whose time the grant was first made. Under these circumstances it seems to us that the provisions of S. 158, Tenancy Act, 2 of 1901, apply to this case. It is quite

clear in respect of any land the proprietary rights in which have been granted to the mahant of a particular institution not for his own benefit but for religious or charitable purposes, as an endowment for instance of a temple maintained by the institution of which the mahant is the head, that on the death of one mahant his successor in office is regarded as having obtained possession of such land by succession within the meaning of S. 34, Land Revenue Act 3 of 1901. There seems no reason why there should not equally be considered to be a succession to the original grantee in respect of a rent-free grant. For these reasons we accept this appeal, and setting aside the orders of the Courts below we direct that the land in suit shall be deemed to be held in proprietary rights by the defendant mahant and by the successors in his mahantship in trust for and on behalf of the temple in question. The Assistant Collector should proceed to determine the land revenue payable by the said trustee in respect of this land. The defendant is entitled to his costs throughout.

V.B./R.K.

Appeal accepted.

K UNIVERSITY LIB.	
K DIVISION	
Acc. No.	76000
Date	11.2.70

L. N. D.
 Advocate High Court
 Jammu & Kashmir
 Srinagar.

END

